VOLUME 46

VOLUME 45

49268

(46 I.A.2d)

541 BRIAR PLACE CORPORATION, Plaintiff, Counter Defendant and Appellee, v. OSCAR HARMAN, Defendant, Counter Claimant Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendant was a tenant in a apartment building owned by the plaintiff. The plaintiff confessed judgment against the defendant for unpaid rent. The judgment was opened up and leave was granted the defendant to file a counterclaim, which he did within the 20 days allowed by the court. Six months later the counterclaim was dismissed.

The defendant appeals from the order of dismissal. He contends that no pleading was filed attacking his counterclaim and that he received no notice of a motion to dismiss.

No appearance or brief was filed in this court by the plaintiff-appellee. Because of the failure to comply with Appellate Court Rule 7, it is unnecessary for us to discuss the case in full and we are warranted in reversing and remanding the case without giving it further consideration. Wright v. C.T.A., 43 Ill. App. 2d 408, 193 N.E.2d 59; Barton v. Barton, 318 Ill. App. 68, 47 N.E.2d 496; Standley v. Standley, 143 Ill. App. 278. Moreover, after examining the record supplied to this court, we conclude that the plaintiff's failure to contest the defendant's appeal is equivalent to a confession of error.

The order dismissing the counterclaim is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded
with directions.

Schwartz, P.J., and McCormick, J., concur.

Gen. No. 63037 (64F14) Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ESTELLE L. BROECKER AND WALTER BROECKER,	:	
Plaintiffs.	:	
ESTELLE L. BROECKER,	:	
Plaintiff-Appellee,	:	APPEAL FROM THE
vs.	:	CITY COURT OF THE
RONNIE SCHALLENBERG and CHUCK DIERING FORD SALES, INC.	:	CITY OF ALTON
Defendants.	:	
CHUCK DIERING FORD SALES, INC.	:	
Defendant, Appellant.	:	

DOVE, P.J.

On April 17, 1959, Plaintiff, Estelle L. Broecker, was walking in a westerly direction along a sidewalk on the north side of Brown Street at or near the intersection of Brown and Seminary Streets in Alton, Illinois. At the same time and place, Defendant, Ronnie Schallenberg, was driving an automobile belonging to Defendant, Chuck Diering Ford Sales, Inc. A hubcap came off the car being driven by Schallenberg, and Plaintiff alleges she was injured by this hubcap.

On April 12, 1961, the instant complaint was filed in the City Court of the City of Alton. It consisted of four counts. By count one, Estelle L. Broecker sought to recover $20,000.00 from Defendant, Ronnie Schallenberg. By count two, this Plaintiff sought a recovery against Chuck Diering Ford Sales, Inc. in a like amount. By count three, Walter Broecker, husband of Estelle Broecker, sought a recovery for loss of the affection, society, companionship, consortium and services of his wife, against Ronnie Schallenberg, in the sum of $10,000.00, and by count four, he sought a like recovery against Chuck Diering Ford Sales, Inc.

The issues made by the complaint and answer were submitted to a jury resulting in a verdict in favor of the plaintiff, Estelle L. Broecker, and against Chuck Diering Ford Sales, Inc. for $1750.00. Judgment was rendered on this verdict, and, after the denial of this defendant's post-trial motion, the record is before us for review upon the appeal of Chuck Diering Ford Sales, Inc. Appellee has not followed this appeal and no brief in her behalf has been filed.

The record discloses that a Mobil Oil filling station is located on the north side of Brown Street at the intersection of Brown and Seminary Streets in the City of Alton. On the afternoon of April 17, 1959, the plaintiff was walking on the sidewalk on the north side of Brown Street. At that time Ronnie Schallenberg was driving a 1955 Chevrolet automobile in a westerly direction on Brown Street. A hub cap came off one of the wheels of the car he was driving, rolled up the street and came to rest in a clump of grass northwest of the gasoline pump.

Mrs. Broecker testified that as she was walking to work that afternoon, and as she was proceeding along Brown Street, she heard something go "ping"; that she "felt an excruciating pain in her shoulder"; that she walked into the filling station and an attendant gave her a chair and she sat down. "While I was sitting down," continued

this witness, "Ronnie Schallenberg came up to me and said, 'are you hurt? Would you like me to take you to work?' I said, 'No. I will wait a while'." On cross-examination this witness said the pain she felt was in her back, across the shoulders and in her spine. "I saw," said this witness, "the hub cap in the driveway. I saw a flash g o by me. This was before I got the pain."

Ronne Schallenberg testified, when called as an adverse witness, under Section 60 of the Practice Act, that he was 18 years of age at the time of the accident; that he, about noon on April 17, 1959, went to appellant's place of business and asked a salesman there if he could drive this Chevrolet car; that the salesman told him he could, and he took the car, drove it about two hours and as he was driving west on Brown Street, he heard the "ting" of a hub cap coming off; that he saw a flash and knew a hub cap had come off; that he was slowing down, intending to stop, and at that time was driving not to exceed 20 miles per hour; that he realized the hub cap had come off and he then proceeded around the block and came back to the filling station and picked up the hub cap and ascertained that it came off of the right back wheel; that he saw plaintiff, who was then leaning on a chair, and she told him he had hit her with the hub cap. This witness further testified that the hubcap was made of aluminum, was 14½ inches "across" and did not weight a pound; that eight clamps held it to the rim and when he picked it up at the filling station it was not dented, or bent, or warped, and that when it came off he heard a "ting" and saw the hub cap roll away.

Kenneth Pitts testified that he was a salesman employed in April, 1959 by Appellant; that he was acquainted with Ronnie Schallenberg and met him on the evening of April 16, 1959, and told him about the 1955 Chevrolet car which Appellant had for sale, and suggested that he come to the used car lot and see it; that Schallenberg did so the next day and said he could make a small down payment; that Pitts then put dealer license plates on the Chevrolet car, and Schallenberg drove it away and was gone an

hour and a half and when he returned he was accompained by his mother; that one hub cap was missing and Schallenberg stated that the hub cap had been lost and that he no longer wanted to buy the car.

At the close of Plaintiff's evidence each defendant moved for a directed verdict. The motions were denied and the instructions refused. No evidence was offered on behalf of the defendants. The court submitted to the jury ten forms of verdicts. Only one verdict was returned by the jury, and this verdict found the defendant guilty, and assessed the damage of the plaintiff, Estelle Broecker, at $1,750.00. No verdicts were returned responsive to the issues made by counts one, three and four of the complaint, and the answers of the defendants thereto. The trial court, however, rendered judgment in favor of the defendants in those counts, and the propriety in so doing is not involved in this appeal.

Count two of the complaint upon which the verdict of the jury was based, alleged that appellant was negligent, (a) in failing to maintain the Chevrolet car in proper repair; (b) in failing to warn Schallenberg of its existing "disrepair"; (c) in failing to inspect the car to determine whether the wheel covers were properly mounted; (d) in failing to properly mount the hubcaps; (e) in representing to Schallenberg that the automobile was in good repair; (f) in failing to repair the hub cap; and (g) in failing to secure the hub cap to the automobile. The answer of appellant denied these charges of omission and commission. We have set forth a fair resume of the evidence offered to sustain these charges.

Appellee tendered, and the court, over the specific objection of appellant, gave to the jury this instruction, viz:

"The plaintiff, Estelle L. Broecker, has the burden of proving each of the following propositions:

"First:

That the plaintiff, just before and at the time of the occurrence, was using ordinary care for her own safety.

"Second:

That the plaintiff was injured in her person.

"Third:

That the injury was received from an automobile which had been under the management of the defendant, Chuck Diering Ford Sales, Inc.

"Fourth:

That in the normal course of events, the injury would not have occurred if the defendant, Chuck Diering Ford Sales, Inc. had used ordinary care while the automobile was under its management.

"If you do draw such an inference, your verdict must be for the plaintiff, if any injury or damage proximately resulted. But if, on the other hand, you find that any of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of others in its management of the automobile, then your verdict should be for the defendant."

At the conference on instructions, counsel for appellant objected to the giving of this instruction, stating that the complaint charged the defendant with specific acts of negligence; that it made no charge of general negligence; and, therefore, the doctrine of res ipsa loquitur had no application. To this objection counsel for appellee stated that the only comment he had to make with reference to this instruction was that "there was no evidence of specific negligence offered or came forth in reference to Chuck Diering Ford Sales, Inc," and concluded that the instruction should be given.

The complaint did not charge that the automobile on the occasion in question was in the exclusive control of appellant or that Schallenberg and appellant had joint exclusive control of the automobile at the time of appellee's injuries, nor did it make any charge of general negligence. These were necessary allegations, and proof to sustain such allegations was essential before the doctrine of res ipsa loquitur could

be invoked.

One approved res ipsa loquitur instruction appears in Illinois Pattern Jury Instructions (IPI 22.01,p. 127). This instruction is:

"The plaintiff has the burden of proving each of the following propositions:

"First; That the Plaintiff just before and at the time of the occurrence was using ordinary care for his own safety.

"Second: That the plaintiff was injured in his person.

"Third: That the injury was received from a hub cap of an automobile which had been under defendant's management or control.

"Fourth: That in the normal course of events, the injury would not have occurred if the defendant had used ordinary care while the autombile was under his control or management.

"If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the automobile while it was under his control or management. If you do draw such an inference, your verdict must be for the plaintiff if any injury or damage proximately resulted. But if on the other hand, you find that any of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of others in his management or control of the automobile, then your verdict should be for the defendant."

The instruction given in the instant case omits this sentence, which is a significant part of the approved IPI instruction, viz: "if you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the automobile while it was under his control or management." As given, the instruction did not require proof of the four propositions set forth in the instruction. It did not intelligently state the law applicable to the pleadings and evidence, and should have been refused.

In the instant case, specific acts of negligence were charged and the law casts upon the plaintiff the duty of proving some of those specific acts. (Krueger v. Richardson, 326 Ill. App. 205, 220, 61 N.E. 2d 398, 405.) The doctrine of res

ipsa loquitur may be invoked only on charges of general negligence. (28 I.L.P. Negligence, sec. 204).

The judgment of the City Court of the City of Alton must be reversed and the cause remanded for a new trial.

Judgment reversed and Cause remanded.

Reynolds, J. concurs.

Wright, J. concurs.

Publish Abstract only.

Abstract

No. 11830 January A.D. 1964

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

(46 I.A.2d 24)

HELEN COULTON, EMMORY WILLIAMS, WILLIE VAUGHAN, ONEDA CASHEN, JULIA OWENS, LENA McENTIRE, JESSIE HUSTON and HALLIE KIMBRELL, Appellants, vs. L. R. NELSON MANUFACTURING CO., INC., Appellee.	Appeal from the Circuit Court, Peoria County.

ROETH, J.

Plaintiffs filed a two count complaint against defendant for reinstatement to their jobs with defendant under a collective bargaining agreement and for back pay. To this complaint defendant filed a motion to strike and dismiss. The trial court sustained the motion and plaintiffs elected to stand on the complaint whereupon final judgment was entered against plaintiffs. This appeal followed.

The complaint in question alleges in substance that defendant is a manufacturer of lawn sprinklers, hose couplings and brass fittings; that plaintiffs on varying dates from 1926 to 1950 entered the employment of defendant and subsequently were employed in various job classifications. The complaint further alleges that in 1958, a labor organization representing plaintiffs and other employees of defendant entered into a collective bargaining

agreement with the defendant and that plaintiffs were third party beneficiaries of this agreement. A copy of the collective bargaining agreement is not attached to the complaint but certain provisions of it are set out in the complaint which, it is claimed, form the basis for this suit. The provision directly involved in this case is as follows:

> "Section VI (b):
>
> > "The relative seniority of the employees in question shall be a primary consideration in all cases of promotion, demotion, reduction in force, and reemployment after reduction in force unless there are definite and substantial differences in skill, ability, efficiency, physical condition or past job performance."

The complaint then alleges that in November, 1960, defendant "informed plaintiffs that they were being terminated because of a reduction in force" and further alleges "said termination of plaintiffs was made by defendant solely upon the ground that plaintiffs were female employees". It is further alleged that subsequent to the termination of plaintiffs' employment, although plaintiffs were available and ready and willing to work, other employees were recalled to work and new employees were hired with less seniority than plaintiffs, which constituted a breach of the collective bargaining agreement. The complaint then seeks to compel the defendant to reinstate plaintiffs to their former job classifications and positions with rights of seniority and to pay back wages. The sole question involved in this appeal is whether or not the complaint states a cause of action. As contended and argued by counsel for defendant in their brief, the question is further narrowed to a determination of whether the facts alleged in the complaint, as hereinbefore set out, are sufficient to show a violation of plaintiffs' rights under Section VI (b)

of the collective bargaining agreement.

The brief of counsel for the plaintiffs does not give us any assistance in resolving the foregoing question. The citation of authorities and argument contained therein are confined to the question of the right of employees to sue the employer for breach of a collective bargaining agreement. This is not the issue presented in this case. Rather the issue is, whether under the provisions of Section VI (b), it was incumbent upon the plaintiffs to allege that they possessed not only seniority but also substantially the same skill, ability, efficiency, physical condition and past job performance as those persons who were subsequently hired or re-hired.

It seems obvious to us that Section VI (b), in the first instance, recognizes the right of the defendant to reduce its work force. It likewise recognizes that at some future time it might be necessary and opportune to increase its work force and re-employ workers. In the latter case the section preserves seniority rights to workers who possess substantially the same skill, ability, efficiency, physical condition, and past job performance as workers with less seniority. These factors are, in effect, conditions imposed upon assertion of the seniority rights. Therefore when plaintiffs seek to state a cause of action for breach of the seniority provisions of the collective bargaining agreement, they must allege that they possess substantially these factors. In this respect the complaint is entirely barren of such allegations and is therefore substantially defective in stating a cause of action.

We conclude that the judgment of the Circuit Court of Peoria County was correct and accordingly it will be affirmed.

Affirmed.

Culbertson, P.J., and Scheineman, J., concur.

No. 11817 Publish Abstract Only January, A.D. 1964

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

46 I.A.2 24

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EAGLE FOOD CENTERS, INC., Defendant-Appellant.	Appeal from the County Court of Rock Island County, Illinois.

Honorable Lawrence L. Phares, Judge Presiding

Scheineman, J.

The defendant, Eagle Food Centers, Inc., was charged with conducting a lottery in violation of Ch. 38, Sec. 28-1 (a) (7), Ill. Rev. St. The court, without a jury, found the defendant guilty and assessed a fine of $200. The facts here summarized, were stipulated:

The defendant operates 13 retail food and grocery markets in Rock Island County. As part of its advertising program, it set up what defendant called a "game" known as "Split the Dollar". Each time a person visited one of the defendant's stores, he was entitled to receive without charge a cardboard coin which, upon being split open, revealed one of five numbers. When a person had collected the combination of numbers 1-9-6-2 or 1-9-6-3, he

qualified for a cash award of $1.00 on the first mentioned combination or $100.00 on the second, provided he could answer a question correctly. The question for the $100.00 award was said to be more difficult than for the $1.00, but no examples were given.

It was necessary to visit one of the defendant's stores to pick up the split dollars. They were distributed at the check-out counter or at the front of the store since it was not required that a recipient pass through the check-out counter or that he purchase any merchandise.

It was further stipulated that the purchase of merchandise added nothing to the chance of winning prizes, that the price of the food and merchandise had not been increased during the "Split the Dollar" program, nor had the quality or quantity been lowered. Those who made purchases paid only the usual cost of the items selected and nothing was paid for the split dollars. The purpose of the program was aimed at attracting new customers to defendant's stores and encouraging visits and purchases by their established trade. The money given away came from the profits of the store.

It is conceded by both parties that the gambling statute prohibiting lotteries, cited above, covers any scheme whereby prizes are distributed by chance among persons who have paid a consideration for a chance to win a prize. The dispute arises over whether or not, under the stipulated facts, the "Split the Dollar" participants paid a price or consideration for the chance to win a prize.

The defendant contends that an indirect benefit to a store owner or mere inconvenience to a participant in the game in having to pick up his chance at the store, do not constitute the paying of a consideration within the meaning of the statute.

The state contends that the phrase, "paid consideration" is not limited to a monetary consideration but includes any benefit to the person conducting the scheme or any inconvenience or disadvantage to the participant.

This type of cash prize plan has been used in many states with various legal results. There are minor variations, but the common design is to attract people to a place of business, in the obvious hope that they will become customers, but without requiring that anything be purchased in order to qualify for a prize. The latter feature is intended to avoid violating a lottery law, and some states hold there is no violation in view of this feature.

In this state, the courts have taken the opposite view following a Massachusetts case, Commonwealth v. Wall, 295 Mass. 70, 3 N.E. 2d 28. In Iris Amusement Corporation v. Kelly, 366 Ill. 256, 8 N.E. 2d 648, the Supreme Court held "Bank Night" is a lottery even though no ticket had to be purchased to qualify for a prize. More recently, in Midwest Television, Inc. v. Robert J. Waaler, Ill. App. 2d , 194 N.E. 2d 653, and in People v. Schaeffer, Ill. App. 2d , N.E. 2d , the Appellate Court held that a cash prize plan quite similar to the one involved here does violate the lottery law.

In this case it is argued for the defendant that the requirement of a correct answer to a question introduces an element of skill which exempts the plan from the lottery law.

It is apparent that this plan requires a person to enter defendant's store a minimum of 4 times in order to draw the numerals 1-9-6-2 or 3. The probability that the person would draw the same number more than once makes it obvious that the participant must make many visits to a store in order to get the winning combination. The time and effort involved in obtaining a winning combination is far out of proportion to the time and effort in answering one question.

It must be held, therefore, that the amount of skill involved is too insignificant to exempt the plan from the lottery law.

The time and effort involved in many visits to a store is a burden placed upon the individual which amounts to a consideration moving from him. In addition, the defendant obtains the advantage of numerous persons making frequent visits to a store where he may be subject to promotional displays and announcements.

It must be concluded that the judgment of the trial court is correct and it is affirmed.

Judgment affirmed.

Culbertson, P.J. and Roeth, J. concur.

46 I.A. 257

49062

THE BIRTCHER CORPORATION,
Plaintiff-Appellee,
v.
OMS SURGICAL SUPPLY, INC.,
Defendant-Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

The Birtcher Corporation sued Oms Surgical Supply, Inc. for $1,083.75 alleged to be due for a cardioscope, pedestal, hood and adapter sold and delivered and on an account stated. Defendant denied these allegations and stated that the equipment was delivered to it "as a demonstrator" and that purchase and payment therefor would be made by defendant if the hospital to which the merchandise was ultimately delivered purchased the equipment. The case was set for trial on October 1, 1962. After the case was called for trial on that morning the defendant filed a petition for a change of venue on the ground that the trial judge was prejudiced against it so that it could not expect a fair trial by him and that knowledge of the prejudice first came to the petitioner that morning because "of the judge's conduct in open court before trial." The court denied the petition for a change of venue. Thereupon the defendant refused to take part in the trial. On a prove-up the court entered judgment against the defendant for $1,083.75. Defendant appeals from the ex parte judgment and the order denying the motion to vacate it.

The case was on the trial call on September 25, 1962. The parties were ready for the trial. The trial judge said that because of two prior cases on his call he could not hear the case on that day. The case was continued to October 1, 1962.

Upon returning to his office the attorney for the defendant ascertained from his calendar that he had another case previously set for hearing on October 1, 1962, in Room 1109, City Hall. He advised the attorney for the plaintiff by letter of his engagement on October 1, 1962 in Room 1109, City Hall and that if the case in Room 1109 did not "proceed" he would be pleased to "proceed" with the instant case set for trial in Room 910, City Hall. The attorney for the plaintiff replied by letter that he would insist upon trial on October 1 because witnesses for his client were moving to a distant place.

On October 1, 1962, at the opening of the court in Room 910 the attorney for the defendant informed the trial judge that he had a prior case in Room 1109 of the same building and would like to answer the call. The trial judge informed the attorney for the defendant that the instant case would be placed on trial before him. Defendant's attorney thereupon went to Room 1109. The case in that courtroom was continued because the judge assigned thereto would not be present that day. The attorney for the defendant returned to Room 910. There is a dispute as to what was said at that time. Defendant says that it asked that the cause be transferred to the chief justice for reassignment to another judge, that it did not request a postponement and that it had its witnesses on hand to proceed with the trial. The plaintiff asserts that the defendant asked the court for a postponement of the instant case "subject to the trial of the supposed other case of defendant's counsel."

Plaintiff maintains that the defendant used the petition for change of venue as a "sham" to avoid trial until after plaintiff's witnesses departed from the jurisdiction of the

court to a far distant place and would not be available to appear in court in the above entitled cause. On the morning of October 1, 1962, defendant's attorney appeared before the trial judge in Room 910, City Hall three times. The first time was when the case was called and when he explained that he desired to go to Room 1109 in the same building to answer the call. The second time was when he returned to Room 910 from Room 1109. The third time was when he returned to courtroom 910, City Hall where the trial judge in the case at bar was presiding and presented the petition for a change of venue which had been prepared after his second appearance that morning. Plaintiff says that on the second appearance of defendant's attorney the latter did not inform the judge that the case in Room 1109 had been continued to another date and that the attorney for the plaintiff informed the trial judge of the continuance of that case.

Plaintiff's position is that the record does not show that the trial judge was arbitrary in denying the petition for a change of venue. The plaintiff also calls attention to the fact that the report of proceedings does not embrace what took place in the courtroom on the first two appearances of defendant's attorney. The petition of the defendant setting out what took place during two of the three appearances of his attorney cannot take the place of a certificate of the proceedings by the trial judge.

In Talbot v. Stanton, 327 Ill. App. 491, the court said, 497: "The motion having been made in apt time upon a petition in proper form, and the right not having been waived by defendant, it was error to deny the change of venue, and all subsequent orders except those entered nunc pro tunc to correct

the record should be rescinded. Yedor v. Chicago City Bank & Trust Co., 323 Ill. App. 42; Mockler v. David F. Thomas & Co., 273 Ill. App. 121, 125. The judgment is reversed and the cause remanded with directions to grant the change of venue and to rescind the judgment." In Miller v. Miller, 43 Ill. App.2d 214, 218, the court said that the record does not support plaintiff's contention that defendant's petition was filed too late for the purpose of delay and reversed and remanded with directions to grant the petition for a change of venue. In People v. Catalano, 29 Ill.2d 197, the court said, 201: "It has often been said that if a petition for change of venue on account of the prejudice of the judge is in compliance with the statute, the right of the defendant to a change of venue is absolute. However, it has also been held by this court that when it is apparent that the request is made only to delay or avoid a trial its denial does not constitute error." The defendant was ready for trial in the instant case except for the prospective engagement of its attorney in a trial in Room 1109, City Hall. Trial lawyers frequently face this situation. We do not think that the defendant's petition was filed for the purpose of delay. We find that under the circumstances shown by the record it was the duty of the trial judge to grant the change of venue.

We agree with the assertion of the plaintiff that the defendant could have proceeded with the trial of the case and not waived its right to urge reversible error in the denial of the petition for a change of venue. In taking the position that it would not participate in the trial the defendant took the chance

that should it not prevail in its contention on appeal based on the denial of its petition for a change of venue that the judgment would stand.

The judgment is reversed and the cause is remanded with directions for further proceedings not inconsistent with these views.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and BRYANT, J., concur.

49118

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MICHAEL NOONAN, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a nonjury trial in the Municipal Court of Chicago, defendant was found guilty of unlawful use of a weapon (Ill. Rev. Stat. 1961, Ch. 38, §24-1(a)) and aggravated assault (Ch. 38, §12-2). He was sentenced to a term of one year in the county jail on each charge, the sentences to run consecutively.

Defendant appeals on the theory that the material allegations of the information for the unlawful use of the weapon were not supported by the evidence; that the court erred in finding defendant guilty of aggravated assault because no information or complaint had been filed for this offense; and that the State failed to prove venue and, therefore, the Municipal Court of Chicago lacked jurisdiction on either charge.

Defendant was arrested and charged by informations with the unlawful use of a weapon, contributing to the sexual delinquency of a minor, and aggravated battery (a felony). Before trial, defendant's counsel announced that he was ready to proceed to trial on the two misdemeanor charges and the preliminary hearing on the felony case. As the same set of facts related to the three cases, the court informed the State's Attorney, "You may or could proceed on both, aggravated assault too."

The prosecution witness testified that she was 16 years old at the time of the occurrence; that on October 12, 1962, she

and a few girl friends went to a lounge located in Melrose Park, Illinois, arriving about 12:30 A.M. At 3:30 A.M., she and a friend were approached by the defendant, who offered to drive the girls home, and they accepted. After "riding around," they went to a restaurant and, after eating, took her girl friend home and they went riding around again. At about 11:00 A.M., defendant and the witness went to the home of a friend of defendant's at "2030 North Newland." The witness waited in the car, and upon the return of the defendant and his friend, they went to a nearby tavern to purchase some beer and then back to the friend's apartment, and the friend left. The witness further testified that, while in the apartment, defendant took a gun from under his shirt and pointed it at her. The first time she saw the gun was outside the apartment, when defendant took it out of the trunk of the car and showed it to his friend, and he then put the gun back into the trunk of the car. He pushed her into the bedroom and onto the bed, making improper demands, and the witness began to fight with him. She attempted to leave the apartment through a window, but defendant pushed her back into the room. He then consented to take her home. Upon leaving the apartment in the early afternoon, defendant drove to a forest preserve, parked the car, and started to caress the witness. When she resisted, he started to choke her; she screamed and fought, and then ran out of the car to a nearby truck driver, who came to her assistance. She was taken by the truck driver to a friend's home, and the truck driver called the police.

Defendant testified and partially corroborated the testimony of the prosecuting witness, except that he denied striking, hitting or choking the witness, and also denied that he had taken

his pistol out of the automobile trunk. He further testified that the witness had voluntarily gone into the bedroom with him, but he "did not touch any part of her body," although he had asked her to have relations with him.

As the offenses are charged separately, we have examined them accordingly. Defendant was found guilty of "the offense of unlawful use of weapon in that: he knowingly, carried concealed in a vehicle, and on or about his person a revolver," and he contends that the "material allegations of the complaint" were not supported by the evidence. We are satisfied that the evidence here was sufficient to prove defendant guilty of the offense of unlawful use of a weapon beyond a reasonable doubt. The witness testified that the defendant had a revolver on his person in the apartment at "2030 North Newland," and that it could not be seen until he pulled it out from under his shirt and belt. Defendant does not dispute that he had such a weapon, but argues that it was in the trunk of his car at all times. The trial court accepted the testimony of the complaining witness on this point, and we find nothing to show that this was improper.

However, defendant argues that the Municipal Court of Chicago did not have jurisdiction to try the defendant on this charge, because the evidence proves that the acts complained of occurred outside the city limits. The witness testified that the pertinent acts occurred in or around "2030 North Newland," without further description. On further direct examination, she answered affirmatively to the question "All this happened in the City of Chicago, County of Cook and State of Illinois?" This was enough testimony to show that the offense was committed in the city in which the trial was being held. In People v. Pride, 16 Ill.2d

82, 88 (1959), the court said:

> "Common experience dictates that a witness testifying in Chicago, when speaking of 8900 S. Anthony Avenue is speaking of 8900 S. Anthony Avenue in Chicago, Cook County, Illinois, although there very well may be an 8900 S. Anthony Avenue in some city other than Chicago, in some county other than Cook and in some State other than Illinois. * * *
>
> "We recognize that the view expressed herein is not only a departure from our early holdings but tends to extend the scope of the Long and Allen cases. However, we are of the opinion that it will improve and accelerate the administration of justice, a goal which we constantly strive to attain, without prejudicing the legal rights of an accused. To hold otherwise would be to protect an accused by the naivety of the court."

Defendant's next contention is that he was never arraigned and never entered a plea to the charge of "aggravated assault." The original information was for "aggravated battery," a felony, of which the Municipal Court did not have jurisdiction. The colloquy of court and counsel shows that the trial court was aware of the lack of jurisdiction unless the charge was reduced to "aggravated assault," which required the filing of an information for the lesser offense and an arraignment.

There is nothing in the record to show affirmatively that defendant was arraigned on the lesser offense, or that he was "furnished with a copy of the information or complaint upon which he is charged, not less than one hour previous to his arraignment, hearing or examination," as required by Chapter 38, section 736a. While it is true that this requirement is directory only, and that unless the accused demands a copy of the information filed against him, he waives such right (People v. Miller, 344 Ill. App. 574, 579 (1951)), the instant record raises serious doubt as to whether defendant or his counsel realized, or were properly informed, that the State intended to proceed on the lesser offense

of "aggravated assault" instead of the felony offense of "aggravated battery." The court inquired of defendant's counsel, "Do you want to proceed on the misdemeanors or the felony?," to which counsel replied, "I'll proceed on the misdemeanors," and the record contains no statement of defendant's counsel to the contrary.

After the finding of guilty of aggravated assault, counsel for the defendant said, "There's no complaint on the reduced charge," and further stated, "The State wanted to proceed on the felony. It's in the record." Other than further discussion, the record contains nothing to dispute this assertion, and we do not find anything waiving defendant's right either to have a proper information on file when the trial proceeded on the lesser charge, or defendant's right to be furnished with a copy of the information before proceeding to trial. We conclude that the ambiguity at the initiation of the proceedings, although attempted to be rectified by the trial court, resulted in the court's lack of jurisdiction of defendant as to the lesser charge and, therefore, the judgment of guilty on the charge of aggravated assault is void. Wood v. First Nat. Bk. of Woodlawn, 383 Ill. 515, 522 (1943).

Defendant's motion in arrest of judgment, which was denied, was sufficient to reach this question, and it was error for the trial court to overrule it. As to this point on review, the proper order is one of reversal without remanding. People v. Plocar, 411 Ill. 141, 145 (1952).

For the reasons given, we conclude that the trial court was correct in the finding of guilty on the charge of unlawful use of a weapon, and that judgment is hereby affirmed. We

further conclude that the trial court was without jurisdiction of defendant on the charge of aggravated assault, and that judgment is hereby reversed.

AFFIRMED IN PART AND REVERSED IN PART.

ENGLISH, P.J., and BURMAN, J., concur.

Abstract only.

49359

GERTRUDE LA BELLE,	)	
	)	
Plaintiff-Petitioner,	)	APPEAL FROM THE
	)	
v.	)	SUPERIOR COURT
	)	
RALPH BROWN, Administrator of the Estate of Richard Tonne, Deceased,	)	OF COOK COUNTY
	)	
	)	
Defendant-Respondent.	)	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case comes here on petition of plaintiff for leave to appeal from an order of the Superior Court of Cook County granting a new trial. The petition was heretofore allowed.

The question involved here is whether, in a personal injury case, the offer into evidence of the police report by the plaintiff in rebuttal was so prejudicial as to constitute reversible error, even though defendant's objection to the offer was sustained.

On September 10, 1954, the plaintiff alighted from a southbound Austin Avenue C.T.A. bus at the northwest corner of Austin Avenue and Grand Avenue in Chicago. She attempted to cross Austin Avenue in front of the bus from which she had alighted, and while crossing was struck by a southbound automobile driven by Richard Tonne. The plaintiff was injured and was taken by ambulance to St. Anne's Hospital and later to Columbus Hospital, where she remained from September 10, 1954 through September 27, 1954. Her family doctor who attended her found that the collision caused a scalp laceration, multiple bruises and a post traumatic psychosis. On September 16, 1954 her

family doctor called in a neuro-surgeon for consultation. His diagnosis was cerebral concussion, post-concussional state, scalp lacerations and mental changes due to trauma. He testified these findings could have been caused by the collision. She also received approximately forty-five physiotherapy and passive exercise treatments from another physician for aggravation of a pre-existing arthritic condition of the back, hands and knees.

James Maahs testified that he witnessed the collision while standing on the northeast corner of Grand Avenue and Austin Avenue. He stated the traffic light for the eastbound plaintiff was green -- that the southbound automobile hit the plaintiff. He testified that he gave his name to a pedestrian but did not recall that he gave the police a statement. On cross-examination he testified that he could not recall giving a statement that he viewed the accident from the rear window of an automobile, or that he was in the back of Kevin Barron's automobile, or his ever having told anyone that the pedestrian turned her back on the car and ran to the middle of the intersection before she was hit. Maahs admitted that his signature was on defendant's Exhibit 1 for identification, which statement was used in this cross-examination.

It is difficult to determine whether any of the statements which he denied, or could not recall, were included in defendant's Exhibit 1 for identification, as defendant's attorney refused to show plaintiff's attorney the document when requested so to do.

Maahs testified that he had no recollection of making the statements appearing on defendant's Exhibit 1 for identification, and that said statements were not in his handwriting. The person who supposedly took the statement was not produced by the defendant.

A police officer of the city of Chicago testified that he arrived at the scene shortly after the collision. He took a statement from several persons concerning whether the driver of the vehicle or the pedestrian had the green light. The statement was signed in his presence by James Maahs and others. This is the statement referred to as the police report. On cross-examination by defendant's attorney the police officer testified that James Maahs stated he viewed the collision from a parked car.

The driver of the C.T.A. bus, Donald Carson, testified for the defendant, and stated that when the plaintiff started crossing, the light was green for southbound Austin traffic and red for Grand Avenue traffic. However, on cross-examination this witness testified that he did not remember whether any other passengers alighted at the time the plaintiff left his bus. He did not recall whether any passengers boarded the bus at that time. He admitted that if passengers had boarded the bus he necessarily accepted their fares and sometimes gave transfers. He also testified that at times he made change for passengers. He did not wait for the police to come to the scene of the accident.

The only offer of rebuttal on behalf of the plaintiff was as follows:

"Mr. Canel: Your Honor, before the plaintiff rests, in rebuttal, I want to offer in evidence that portion of Plaintiff's Exhibit Number 5, which is the Police Report, that pertains to the color of the light at the intersection of Grand and Austin, signed by Mr. James Maahs — he signed the statement. I want to offer that for the limited purpose, at this time, to refute the inference that there might be a recent motive to fabricate the story. I want to cite to your Honor — (Citations completely inaudible —).

"Mr. Dunning: If the Court please, that is objected to for the reason that the statement is in violation of the best Evidence Rule. The statement contains the signature of two witnesses that have not testified here, and have not been called to testify there, and because the only portion that was used was for the purpose of impeachment of a prior statement.

"The Court: In view of the fact that it amounts to a joint statement signed by three witnesses, the objection will be sustained."

The jury found in favor of the plaintiff and assessed damages at $4,250.00.

On post-trial motion the court sustained one of the points raised and granted the defendant a new trial on July 1, 1963. On September 9, 1963 the order of July 1, 1963 was supplemented by adding the following:

"The said new trial is granted on account of plaintiff's attorney's prejudicial conduct in offering in evidence a statement taken from James Maahs by the Chicago Police Department which is Count II of defendant's motion for new trial."

The defendant claims that the mere offer of the police report was so prejudicial as to constitute reversible error despite the fact that the objection to it was sustained by the court. The plaintiff claims that since the defendant did not object to plaintiff's counsel's alleged prejudicial conduct at the trial he cannot object for the first time in his post-trial motion. The court sustained the objection to

the offer not on the ground that a police report as such is not admissible, but on the ground that it was a joint statement and the plaintiff further contends that if the offer into evidence of the police report constituted prejudicial conduct the defendant should at that time have made a motion for a mistrial, and having failed so to do cannot rely on it in a post-trial motion.

The plaintiff cites the case of Andres v. Green, 7 Ill. App. 2d 375. In that case the defendant complained that the plaintiff sought to inject insurance into the case by pointing out an insurance adjuster sitting in the courtroom, and that plaintiffs' counsel indulged in unfair argument. Plaintiffs' counsel in that case inquired of a witness as to the identity of the person who obtained the witness' signature to a statement offered by the defendant for impeachment purposes and asked if the witness could point out the man in the courtroom. The objection to this procedure was sustained. There was no mention by the plaintiffs' counsel of the word "insurance" or anything that would indicate who the man in the courtroom was. The unfair argument complained of was the statement of defendants' counsel that "some people would not go through that injury for any amount." Objection to that remark was sustained. The court on page 382 said:

> "In both instances defendant failed to move to withdraw a juror. By failing to do so defendant waived the right to complain of error in that regard. Wilson v. Hobrock, 344 Ill. App. 147; Lindroth v. Walgreen Co., 338 Ill. App. 364."

In the case of Pearman v. Morris, 15 Ill. App. 2d, 486, the court held that in a case where the plaintiff's attorney misquoted evidence to the jury, which was prejudicial to the rights of the defendant, by failing to move to withdraw a juror the defendant had waived the error and could not complain of it.

In the case of Vasic v. Chicago Transit Authority, 33 Ill. App. 2d 11, the attorney for the defendant had a photograph marked as its exhibit. It was the photograph of an intersection. In the photograph was a bus similar to the one involved in that litigation. An objection was made to the use of the photograph because of the presence of the bus. Counsel for defendant suggested that the witness turn the picture so the jury could see it. Plaintiff objected and the court sustained the objection. Then, for a second time, defendant's attorney suggested that the witness turn the picture toward the jury so they could see it. The procedure was again objected to and again sustained. The court stated that the only purpose the picture could be used for was to refresh the witness' recollection. Subsequently counsel for the defendant offered the picture in evidence. Plaintiff objected and stated that the court had already expressed an opinion as to the admissibility of the picture. The court sustained the objection of the plaintiff.

The Appellate Court held that counsel acted improperly in offering the picture in evidence after the court had ruled it could not be admitted except by agreement, and that it was also improper to make repeated attempts to have

the picture turned so the jury could see it. The Appellate Court further held that the trial court had ruled properly andpromptly, and the jury had no opportunity to see the picture, and that it did not appear that anything was said or done in the various discussions with regard to the exhibit which did or could have influenced the jury so as to make it reversible error.

The defendant has cited numerous cases in support of his contention that the offering of the police report was so prejudicial as to constitute reversible error, even though defendant's objection to the offer was sustained. The first case cited was the case of Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21. In that case, as in this, the question of the offering of a police report into evidence was discussed. That case differs from the case at bar in that the attorney for the defendant moved for a mistrial, and in chambers the plaintiff admitted that the statement could not be properly introduced into evidence except by agreement. There was no agreement. The offer to introduce the police report was made twice before the jury, the second time after a motion for a mistrial.

In the case of Johnson v. Plodzien, 31 Ill. App. 2d 222, cited by the defendant, the police report was admitted in evidence.

In the case of Moore v. Daydif, 7 Ill. App. 2d 534, the attorney insisted repeatedly upon the introduction of the police report in the presence of the jury, and in Smith v. Johnson, 2 Ill. App. 2d 315, the defendant's counsel

challenged the plaintiff in the presence of the jury, repeatedly, to introduce the police report into evidence, and the Appellate Court there held that because of defendant's insistence that it be received in evidence, and because of other errors committed during the trial, the judgment was reversed.

We have concluded that the offer in evidence of the police report in this case in rebuttal was not prejudicial misconduct on the part of plaintiff's attorney such as would warrant the granting of a new trial. It would seem to be unreasonable to permit the defendant to stand by without raising an objection that the conduct of the attorney was prejudicial, and at the same time have an objection sustained to the admissibility of the police report on other grounds, and then wait for the outcome of the jury's verdict, when for the first time finding it is adverse to the defendant, he then raises the objection that the offer was prejudicial misconduct. The defendant could have asked that a juror be withdrawn and that a mistrial be declared, based upon the alleged prejudicial misconduct of plaintiff's attorney. Instead, he, no doubt, felt that by refraining from objecting on the ground of prejudicial misconduct and not moving to withdraw a juror, he could take his chances with the first jury and hold back his charge of prejudicial misconduct for a post-trial motion.

We have examined the record and feel that the preponderance of the evidence was with the plaintiff. We, further, are of the opinion that the statement made at the time of the offer could not have prejudiced

defendant's case, and that the single offer having been made, to which an objection on other grounds was sustained, under the facts in this case, did not operate to the prejudice of the defendant.

For the foregoing reasons the order of the trial court, granting a new trial, is reversed and the cause is remanded to the trial court with directions to vacate the order granting a new trial and to enter judgment on the verdict.

Order reversed and cause remanded with directions.

Schwartz, P.J., and Dempsey, J., concur.

11794

UNITED STATES OF AMERICA (46 I.A.2160)

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Ottawa, on the 1st day of January, in the year of our Lord one thousand nine hundred and sixty-four, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable WILLIAM M. CARROLL, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk Pro Tempore
JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On FEB 24 1964 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Abstract

No. 11794

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ANN L. BIDSTRUP, Plaintiff-Appellee vs. FRANK OTTO BIDSTRUP, Defendant-Appellant.	Appeal from the Circuit Court of DeKalb County

CARROLL -- J.

Defendant appeals from a decree of the Circuit Court of DeKalb County awarding plaintiff a divorce on grounds of extreme and repeated cruelty.

The parties were married October 4, 1958. They had lived together for a period of some twenty-three years prior to their marriage, during which time five children were born to them. The complaint alleged that shortly after the marriage of the parties, defendant commenced a course of cruel treatment towards the plaintiff; that on November 29, 1962, defendant threw plaintiff violently to the floor causing her severe pain and injuries; that about the middle of October, 1962, defendant pushed and shoved plaintiff out of her bed so that she fell on the floor, severely hurting her arm; that on other occasions defendant hit and beat plaintiff, seriously hurting her; that all of such acts of defendant were unprovoked;

and that as a result of such conduct and as a result of defendant's cruelty plaintiff was forced to leave the home of the parties. Since on this appeal the defendant questions only the sufficiency of the proof to support the charges of cruelty, we omit further reference to the complaint allegations.

Defendant answered the complaint, denying that he was guilty of the acts of cruelty as therein charged. Issue being joined, the cause was heard by the court without a jury.

It is contended on this appeal that (1) Plaintiff did not prove two acts of cruelty during the marriage of the parties; (2) that the court heard evidence of cruelty prior to the marriage; (3) That there was no corroboration of plaintiff's testimony as to the acts of cruelty; (4) That plaintiff condoned the acts of defendant; (5) That the court erred in not permitting defendant to re-open his case and offer evidence of acts of cruelty on plaintiff's part.

Plaintiff testified that on November 29, 1962, defendant came home late at night; that he pushed her out of bed, started shoving her around, and as a result her arm was badly hurt; that on an occasion about the middle of October, 1962, defendant came home late at night and pushed her out of bed; that she landed on the floor and was injured; that she ran into the bathroom; that he fastened the bathroom door so that she could not get out; that she slept all night in the bathroom; that in the spring of 1960, defendant came home from Aurora and had been drinking; that he then knocked the plaintiff down and started hitting her; that she and the children then ran from the home and stayed with a neighbor; that defendant was always shoving her around; that one day he shoved her down and tore her clothes off; that she was afraid of

him; and that at no time did she strike the defendant. Kenneth Bidstrup, a son of the parties, testified he was present when his father struck his mother; and that he recalled many nights when his father pushed his mother out of bed. This witness and Louise Ellis, mother of plaintiff, testified to seeing plaintiff at a time when she had a black eye and bruised cheek resulting from injuries inflicted by defendant.

Defendant testified and in substance denied all of the alleged acts of cruelty. However in some instances, his testimony cannot be characterized as forthright and direct. For instance, when asked whether he ever struck his wife and blacked her eye, he answered, "No, I don't think so. I am sure of that." Also, when he was asked whether at one time he came home from Aurora after drinking and knocked his wife to the floor, he answered, "I don't even remember."

While we have not attempted to detail all of the testimony adduced on the trial, we think it establishes without question that the evidence as to the defendant's alleged cruelty was in conflict. As to what constitutes extreme and repeated cruelty has been considered by the courts in many cases. Each case must be determined upon its own facts, including the nature of the acts and other relevant circumstances tending to show the probable effect of such acts. Cruelty within the meaning of the Divorce Act is established where it is proven by a preponderance of the evidence that the guilty party has on at least two separate occasions committed acts of physical violence against his or her spouse, causing pain or bodily harm. Tuyls v Tuyls 21 Ill. 2d 192; Surratt v Surratt 12 Ill. 2d 21; Sayad v

Sayad 27 Ill. App. 2d 250 (Abst.) It is true that slight acts of cruelty on the part of one spouse towards the other does not qualify as extreme and repeated cruelty as such term is employed in the Divorce Act.

Here the plaintiff testified that she was subjected to physical violence at the hands of the defendant on two or more separate occasions; that bodily harm and attendant suffering resulted. The defendant testified that he did not commit such acts of cruelty. The trial court confronted with this conflicting testimony saw fit to believe the plaintiff, and as indicated by the decree, was convinced that the acts established by plaintiff's testimony amounted to extreme and repeated cruelty. The trial court heard the witnesses testifying in open court, had an opportunity to observe their conduct and demeanor while testifying; and thus was in a much better position to determine their credibility than is a reviewing court. Only where a trial court's decision is manifestly against the weight of the evidence will it be disturbed. Curran v Curran, 19 Ill. 2d, 164; Teal v Teal 324 Ill. 207. Since in this case the decision of the trial court is obviously dependent upon the weight and credence accorded the testimony, we would not be justified in disturbing the decree. We cannot say the trial court erred in finding as it did, that plaintiff had proven her case by a preponderance of the evidence.

Defendant advances the proposition that a divorce will not be granted upon un-corroborated testimony as to alleged acts of cruelty. Where as in this case the complaint is not taken as confessed and the cause is not heard as a default, there is no rule requiring corroboration of the plaintiff's testimony if it alone is sufficiently credible in the light of oppossing evidence to

warrant its acceptance by reasonable persons. Surratt v Surratt, supra. It is true that paragraph 9 of the Divorce Act provides that "If the complaint is taken as confessed, the court shall proceed to hear the cause by examination of witnesses in open court" but such provision does not apply to the case at bar for the simple reason that here the complaint was not taken as confessed, but the cause was heard on the complaint and answer. However we do not intend to say that in all contested cases the uncorroborated testimony of the plaintiff is sufficient. Absence of corroborating testimony may well be an important factor in weighing the evidence and determining where the preponderance lies.

Another point argued is that the decree should be reversed because the plaintiff testified to acts of cruelty which occurred during the twenty-three year period when the parties lived together but were not married. No cases are cited in support of this particular point. The specific acts of cruelty set out in the complaint are alleged to have occurred during the marriage. There is evidence in the record that at least two of the acts of which plaintiff complains occurred subsequent to the marriage of the parties. The fact that the plaintiff may have testified as to the conduct of the defendant prior to the marriage is of no consequence as we would have no right to assume that the trial court based its decision on such evidence.

After the entry of the decree, defendant filed a motion for a new trial and what is referred to in the statement of facts in his brief as a "Motion to open proofs." In the latter motion, defendant sought leave to raise the defense of recrimination. Such defense had not been set up in the answer. Recrimination is an affirmative defense and generally should be pleaded to be available

as a defense. Here was there not only a failure to raise such a defense, but no evidence concerning same came out on the trial. In such situation the trial court properly denied defendant's motions. I.L.P. Divorce, Sec. 53.

It is clearly apparent from the record in this case that the determination made by the trial court is dependent upon the weight and credence to be accorded the testimony of the witnesses. In this situation we would not be justified in reversing the decree and it is accordingly affirmed.

AFFIRMED:

Abrahamson, P. J., and Moran, J., Concur

United States of America

State of Illinois,
Appellate Court,
Second District, } ss.

I, Howard K. Kellett, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.*

In Testimony Whereof, *I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this* 27th *day of* July *A. D. 196*7

Howard K. Kellett

Clerk Appellate Court,
Second Judicial District

GENERAL NO. 63.042 (64F18) (46 I.A.2 248) AGENDA NO. 12.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LARRY PHILLIPS, Defendant-Appellant.	Appeal from the County Court of Clay County.

REYNOLDS, J.

The County Court of Clay County found Larry Phillips guilty of non-support of his wife and ordered him to pay $25.00 per week to the clerk of the court for the support of his wife, Shirley Phillips. Defendant appeals.

On appeal, defendant contends the evidence was insufficient to support the conviction, the conviction was contrary to law, and that the trial court erred in entering judgment without giving the parties an opportunity to argue the cause.

Since the defendant waived his right to a jury trial and was tried before the court, the refusal of the court to hear arguments

was not reversible error. If the trial had been before a jury, argument would have been a right, but in a trial before the court alone, argument is largely a matter of sound discretion of the trial judge. Our courts have said that even when the judge himself, without a jury, is hearing the case, he should permit both counsel to present, briefly, their respective views before attempting to decide the case. However, refusal to hear argument is not error, for the reason that the testimony was all taken before the trial judge; he had the opportunity to see and to hear the witnesses, and to observe the attitude and manner of the testimony of the defendant. He could judge the weight to be given the evidence, and argument would not have aided the court very much. People v. Berger, 284 Ill. 47; People v. Manske, 399 Ill. 176.

While defendant contends the conviction was contrary to law, since no contention is made that the law under which he was tried and convicted is unconstitutional, or that the trial was not proper, other than the argument question, it seems unnecessary to consider this contention. If the conviction was against the palpable weight of the evidence, or if the defendant had not been proved guilty beyond a reasonable doubt, then the conviction was contrary to law. It would thus seem, that the only question before this Court is whether he has been proved guilty beyond a reasonable doubt.

Our courts have held that a reviewing court is not justified in setting aside a verdict of guilty unless the testimony is so palpably conflicting as to indicate that the verdict was the result of

passion or prejudice or that the defendant had not been proved guilty beyond a reasonable doubt. People v. Johnson, 298 Ill. 52; People v. Hinderhan, 405 Ill. 435; People v. Ulrich, 411 Ill. 316; People v. Allen, 413 Ill. 69.

Unless the Appellate Court is convinced that the conclusion of the trial court is contrary to the weight of the evidence, it should not substitute its judgment for that of the trial court. People v. Bridgewater, 369 Ill. 633; People v. Diekelmann, 367 Ill. 372; People v. Stills, 302 Ill. App. 302. Every reasonable intendment must be indulged in support of the judgment below. People v. Rose 350 Ill. App. 338.

Conversely, whenever the reviewing court is convinced that the verdict of the jury or a trial court is contrary to the weight of the evidence or that the defendant has not been proved guilty beyond a reasonable doubt, it has a duty to reverse the judgment. One of the requirements in our criminal procedure that has never varied is unquestioned and is the bulwark of our conception of criminal justice, is, that a defendant in a criminal proceeding must be proved guilty beyond a reasonable doubt.

In this case, the complaining witness and the defendant were married April 22, 1962, and separated on or about April 9, 1963. The defendant served six months in the Army, being discharged about August 9, 1962. During his service in the Army, the complainingwitness lived with her parents. After defendant's discharge from the Army, they lived with his parents for some two and one-half weeks, and then the wife refused to live there any longer, and went back,

or was taken by the defendant, at her request, to the home of her parents. They were apart about one week, and then lived again at a home in the City of Flora, Illinois. About April 10, 1963, they again separated. He was employed by Sparton Corporation at a salary of $300.00 per month. Afterwards he took a job with Marathon Oil Company, with a salary of $386.00 per month. Since the separation, the defendant has not paid anything for the support of his wife. At the time of the last separation, about April 10, 1963 he maintained a home for himself and wife at 321 Adams Street, in Flora, Illinois, where he paid the rent and provided the necessities for his family. About May 5, 1963, the wife went to the home formerly occupied by her and her husband and removed all the furniture and furnishings and household articles belonging to the parties except a few items purchased through loans from the defendant's parents, and a food mixer.

While there was some conflicting testimony, in the main there is not too much dispute as to what was said and what took place. The wife admits telling the defendant "Well, I am not coming back and that is sure," and that on two occasions she had told him she would not live with him. She further admitted that she had never requested the defendant to resume living with her. The wife was pregnant at the time of the separation. She testified she was without means of support and was unemployed.

The information charged the defendant with unlawfully, without any lawful excuse, neglecting and refusing to provide for the

support and maintenance of his wife, she being then and there in need of such support and maintenance, contrary to the statute. Her need for such support and maintenance being unquestioned, the only other matter necessary to be decided is whether the defendant was guilty as charged of neglecting and refusing to provide such support and maintenance.

Although the evidence is supplied by stipulation, such stipulation must be accorded the same weight as transcribed testimony, and there is nothing in the stipulated testimony to show that the defendant had refused to provide for the support and maintenance of his wife. He was maintaininga home and providing the necessities of life. He was working. The wife left him, and there is nothing in the testimony to show any good and sufficient reason for so doing. The defendant maintained the home for some 30 to 40 days after the separation, but the wife kept insisting she would not return to the home. The separation would appear to be the idea of the wife, although apparently the defendant did not object to it. Such an arrangement could be a matter of convenience, but not one of guilt on the part of the defendant.

On the basis of the record here, it seems clear that the guilt of the defendant has not been proved beyond a reasonable doubt. That being so, it is the duty of this court to reverse the judgment. While our courts have zealously protected the right of the wife to support from her husband, in proper cases, our courts must not be made vehicles of injustice. To hold this defendant is guilty of refusing or neglecting to provide for the sup-

port and maintenance of his wife, would be to condone and support wives leaving their husbands and their home without good and sufficient reason.

For the reasons stated the judgment of the County Court will be reversed.

Reversed.

Dove, P. J. and Wright, J., concur.

Publish Abstract only.

49092

EDWARD LYONS, APPELLEE	)	APPEAL FROM
V.	)	CIRCUIT COURT
MIDWEST TRANSFER COMPANY OF ILLINOIS, APPELLANT	)	COOK COUNTY

46 I.A.2 275

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a judgment entered in the Circuit Court of Cook County in favor of Edward Lyons, plaintiff, and against Midwest Transfer Company of Illinois, defendant, in the sum of $10,000. The case was tried before a jury. The trial court overruled the post-trial motion of the defendant.

The defendant here asks that the case be reversed and remanded with instructions to the trial court either to enter a judgment notwithstanding the verdict or, in the alternative, to grant the defendant a new trial.

The evidence is in sharp conflict. Our courts have held repeatedly that ordinarily the question of contributory negligence is a question for the determination of the jury, and it becomes a matter of law only where it appears that there has been a complete failure of proof on a substantial element of plaintiff's case, and where it can be said that all reasonable minds must agree that the plaintiff's injury resulted from his own negligence. Edwards v. Martin 2 Ill. App. 2d 34; 117 N.E.2d 864. The trial court did not err in refusing to enter judgment notwithstanding the

verdict in favor of the plaintiff. On the question of whether the case is against the manifest weight of the evidence it will be necessary to consider the testimony given in the trial court.

The accident occurred on November 25, 1953, sometime after 7:00 p.m., on U. S. Highway 12, north of Fox Lake, Illinois. In this vicinity the highway passes over a bridge. For the length of the bridge and for approximately 200 to 300 yards north of the bridge, U. S. 12 is a 4-lane highway which is straight. Continuing north the roadway then curves and becomes two lanes. The bridge has a hump or roll in it near the center. Traffic moving across the bridge moves up the incline, reaches the center of the bridge, and then starts down. There is a double yellow line dividing the north and southbound lanes. The bridge is approximately 150 feet long and 44 feet wide. The accident occurred in the center of the bridge.

The plaintiff, who was an employee of the Illinois State Highway Department, had been directed to determine if the bridges were icy and if so to spread cinders on them. The regular helper of the plaintiff was unavailable and he asked his neighbor, Willard Bychowski, to go with him. They first drove the state-owned dump truck, loaded with cinders, south on U. S. 12 over two bridges. The bridge was frosting over and was beginning to glaze. They then turned back north. Bychowski was in the back of the truck with a shovel, ready to spread cinders. They covered one bridge and then proceeded north onto the bridge where the

accident occurred. There was considerable traffic moving both ways, as it was Thanksgiving Eve.

Here the evidence is in sharp conflict. The plaintiff testified that he was in the outside lane about 6 to 8 feet from the east side of the bridge; that he saw the tractor-trailer owned by the defendant coming south, traveling about 45 miles an hour, and that it crossed from the southbound into the northbound lane. There was a collision and both Bychowski and Lyons were thrown from the truck. The tractor, after the accident, collided with the east end of the bridge. The driver of the tractor was killed and the tractor was practically destroyed by fire.

There is no dispute that the truck driven by the plaintiff had a snow plow attachment located on its front, that the point of that attachment collided with a "saddle tank" which was on the right side of the rear of the cab of the tractor. At the time, the truck of the plaintiff was proceeding at 8 miles per hour. Bychowski testified that at the time when the truck was going up the incline of the bridge the plaintiff had opened the door of the driver's cab, and with one foot on the running board, turned around and started to talk to him. The truck continued in motion, and the plaintiff, steering with one hand and holding the door open with the other, turned and talked and then turned back. He would look forward and look back for a very short time, a matter of a split second.

All of this testimony is flatly contradicted by the plaintiff.

The plaintiff testified that during the entire time he was in the cab of the truck with both doors closed. The plaintiff also testified that at the time when he saw the truck of the defendant crossing the center line it came at a 45-degree angle and passed in front of the plaintiff's truck. Bychowski testified that when the truck was crossing the bridge more than half the truck was over in the lane for southbound traffic and was in that position at the time of the collision. Bychowski further testified that at the time of the collision the trailer had hit the bridge and caught fire. He testified that after the impact the state truck was turned around a little bit and was on an angle in the middle of the road facing east, and that he did not recall the position of the state truck because he was looking at the tractor-trailer.

After the accident an investigation of the occurrence was conducted at the scene by Louis Vocke, a police officer from Fox Lake. He testified that he found both vehicles on the east side of U. S. 12 in the northbound lanes. The defendant's semi-trailer was facing south, parallel to the guard rail on the east side of the bridge. It was in the northbound lane nearest to the guard rail. Plaintiff's truck was facing south about 2 or 3 feet north of the tractor on defendant's semi-trailer.

In response to a telephone call, Mrs. Lyons, the wife of the plaintiff, came to the scene of the accident. She testified that the car in which she was riding proceeded south in the west lane on the bridge and that the semi-truck was on the east side of the

road.

In 2 I.L.P. Appeal and Error, §776, is set out the rule governing the right of an Appellate Court to reverse a case on the ground that the verdict of the jury was against the manifest weight of the evidence:

> "It has been said that the finding of a jury on a question of fact is conclusive on appeal if it is supported by the evidence, or the evidence, although conflicting, tends to sustain the verdict, and nothing appears in the record from which the court may say that the jury was moved by prejudice, partiality, or mistake.
>
> "The Appellate Court cannot invade the function of the jury and substitute its judgment for that of the jury on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way. The Appellate Court should abide by the finding of the jury on questions of fact."

Also see City of Monticello v. Le Crone, 414 Ill. 550, 111 N.E.2d 338.

It is the duty of the jury to reconcile conflicting versions of the occurrence given by the witnesses in their testimony, and the verdict can only be set aside by a reviewing court when it is against the manifest weight of the evidence, which means that in addition to the verdict of the jury, the reviewing court must take into consideration the fact that the trial judge who had the opportunity of observing the witnesses testifying, refused to allow the losing party a new trial. The jury are the judges of the credibility of the witnesses. A reviewing court cannot substitute its judgment for that of the jury in passing on the credibility of the witnesses and the weight of their testimony, and in order for

a verdict to be held contrary to the manifest weight of the evidence an opposite conclusion must be clearly apparent. Stone v. Guthrie, 14 Ill. App.2d 137, 144 N.E.2d 165; Tabor v. Tazewell Service Co., 18 Ill. App.2d 593, 153 N.E.2d 98; Mokrzycki v. Olson Rug Company, 28 Ill. App. 2d 117, 170 N.E.2d 635.

The defendant argues that the testimony of the plaintiff in this case is unbelievable and since there were only two witnesses testifying and their testimony was in sharp conflict, the plaintiff's testimony was unreasonable when the position of the cars after the accident is taken into consideration. A careful reading of the testimony does not support this contention. Both Bychowski and the plaintiff testified that the sharp point of the plow on the plaintiff's truck gored the "saddle tank" on the right side of the tractor. This would be impossible unless the defendant's tractor was driven as plaintiff testified at an approximate 45-degree angle directly in front of and crossing the normal lane of travel of the plaintiff's truck. The testimony of Vocke, who investigated the accident, indicated that the tractor-trailer was facing south on the east side of the bridge in the northbound lane parallel to the rail on the east side of the bridge and in the lane nearest to the guard rail. The state truck was facing south on the east side of the bridge to the west of the semi-trailer and a few feet back of it. It must be remembered that this was a 4-lane highway and that the tractor-truck of the defendant, proceeding south, normally would be in the westermost lane of that

highway. This fact, taken in connection with the position of the vehicles after the accident, would tend to support the testimony of the plaintiff that the tractor-trailer crossed the highway in front of him.

The plaintiff cites Peaslee v. Glass, 61 Ill. 94 in his favor, but that case is not applicable inasmuch as there were two witnesses testifying for the defendant, and besides, the case was criticized, and we feel properly so, in Sears Roebuck & Co. v. Mears Slayton Lumber Co., 226 Ill.App.287.

The defendant also argued that the plaintiff was impeached by testimony allegedly given by him on December 15, 1953, at the inquest over the body of the driver of the truck. It does not appear to us that the testimony given by the plaintiff at the inquest contradicts the testimony which he gave at the trial of the case, and even if it could in any way be said that such testimony was impeaching, it would have been the duty of the defendant to have introduced evidence to prove what testimony was given by the plaintiff at the inquest. This was not done, and the statements made by the plaintiff at the inquest could have properly been disregarded by the jury.

There was sufficient evidence in the record to support the jury's finding that the defendant's agent was guilty of negligence and that the plaintiff was operating his truck with due care.

The next question raised by the defendant is that the verdict

which assessed damages in the sum of $10,000 is so excessive as to indicate it resulted from passion or prejudice. We have carefully examined the medical testimony. The plaintiff called two physicians; one an attending physician and another a physician who had examined the plaintiff solely for the purpose of testifying. Both of these physicians described the present condition of the plaintiff as permanent, and they both testified, in answer to hypothetical questions, that there could be a causal relationship between the plaintiff's present complaints and the injury which he had sustained on the date given.

The defendant urges that the hypothetical questions contained matters that were improper. Whether that was true or not, we cannot consider it since counsel for the defendant did not at the time properly object to the questions. When we consider that the defendant had from the date of the accident submitted to various treatments from various doctors (one treatment being a neck traction device), and his testimony that his neck aches constantly and gets worse when the weather changes, together with the testimony of the physicians that the injury suffered by the plaintiff is permanent, the lack of any evidence in the record contradicting their conclusions makes it impossible for us to say that the verdict of $10,000 was excessive or caused by passion and prejudice. In Alexander v. Lanterman, 39 Ill. App.2d 305, 188 N.E.2d 351 the court said:

> "However, the assessment of damages is preeminently the function of a jury. To attempt to apply a mathematical formula to that function might well create injustices one way or another. Lau v. West Towns Bus Co., 16 Ill. 2d 442, 158 N.E.2d 63."

In Myers v. Nelson, 42 Ill. App. 2d 475, 192 N.E.2d 403 the court said:

> ". . . The rule is that a verdict for personal injuries will not be disturbed by a reviewing court unless so palpably excessive as to indicate the jury acted from some improper motive. Lester v. Hennessey, 29 Ill. App. 2d 11, 172 N.E.2d 403. The question before us is whether or not the amount of the verdict falls within the necessarily flexible limits of fair and reasonable compensation or is so large as to shock the judicial conscience. Barango v. Hedstrom Coal Co., 12 Ill. App. 2d 118, 138 N.E.2d 829."

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ENGLISH, P.J., and DRUCKER, J., concur.

GENERAL NO. 37,847 AGENDA NO. 3 (64-F-3)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

HAL PAINTER, JR., Plaintiff-Appellee, vs. WILLIAM E. CHARLTON, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY.

REYNOLDS, J.

This is a suit for personal injuries growing out of a collision between the automobiles of the plaintiff and the defendant. Both plaintiff and defendant were traveling northwardly, along Nameoki Road in Granite City, Illinois, and at the intersection at East Twenty-Fourth Street, defendant ran into the back of the plaintiff's car, injuring plaintiff.

At the close of all the evidence, plaintiff moved for directed verdict as to liability and this motion was granted. The matter of damages was left to the jury. The jury returned a verdict for plaintiff for $7500.00 damages. Defendant appeals.

Defendant driving northwardly on Nameoki Road in Granite City was following plaintiff. Both cars were traveling about 25 miles per hour. Defendant testified he was about two or two and one-half car lengths behind plaintiff. Plaintiff stopped to make a left turn and defendant ran into the back of plaintiff's car. Plaintiff claimed personal injuries.

The appeal presents two questions. 1. Should the court have allowed the motion for directed verdict for the plaintiff as to the defendant's liability? 2. Having granted the motion for directed verdict, should the jury that heard the testimony as to liability, be allowed to pass on the question of damages? If the answer to the first question is "No", the second question is immaterial.

It is the function of the jury to weigh contradictory evidence and inferences and to draw ultimate conclusions from the facts. Utmost caution should be exercised to uphold the sanctity of trial by jury. King v. Ryman, 5 Ill. App. 2d 484, 125 NE 2d 840; Mokrzycki v. Olson Rug Co., 28 Ill. App. 2d 117.

On motion for judgment notwithstanding the verdict, or for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the party resisting

the motion. Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 46. The question of negligence does not become a "question of law" unless the evidence is such that all reasonable minds would agree that defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence. Piper v. Lamb, 27 Ill. App. 2d 99, 108. The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party had performed his legal duty or has observed that degree of care imposed upon him by the law, and determination of question involves weighing and consideration of the evidence, the question must be submitted as one of fact. Peterson v. Hendrickson, 335 Ill. App. 223. Even where the facts are admitted or undisputed, but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the question of negligence and contributory negligence ought to be submitted to the jury - it is primarily for the jury to draw the inference. Denny v. Goldblatt Bros., Inc. 298 Ill. App. 325; Cloudman v. Beffa, 7 Ill. App. 2d 276; Pantlen v. Gottschalk 21 Ill. App. 2d 163; Piper v. Lamb, 27 Ill. App. 2d 99. As long as a question remains whether either party had observed that degree of care and caution imposed upon him by law, and the determination of the question involves the

weighing and consideration of the evidence, the question must be submitted as one of fact. Cloudman v. Beffa, 7 Ill. App. 2d 276; Piper v. Lamb, 27 Ill. App. 2d 99.

The right of the trial court to enter judgment for the plaintiff finding the defendant guilty and grant a trial on the question of damages only is unquestioned. Recent cases have done this, where the evidence established, as a matter of law, that defendant was negligent and that the plaintiff not contributorily negligent. Betzold v. Erickson, 35 Ill. App. 2d 203, 182 NE 2d 342; Ceeder v. Kowach, 17 Ill. App. 2d 202, 149 NE 2d 766; Lowe v. Gray, 39 Ill. App. 2d 345, 350. However, if there is any evidence, however slight, of contributory negligence on the part of the plaintiff, a question of fact is presented and it must be presented to the jury for determination. The plaintiff must sustain his burden of proving due care and caution on his part. That is a question pre-eminently for the jury. Conner v. McGrew, 32 Ill. App. 2d 214, 219, 177 NE 2d 417; Lowe v. Gray, 39 Ill. App. 2d 345, 350. Freedom from contributory negligence on the part of the plaintiff and negligence on the part of the defendant are indispensable elements in a suit of this character. The question of contributory negligence is ordinarily and preeminently a question of fact for a jury. Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153, 162; Ney

v. Yellow Cab Co., 2 Ill. 2d 74, 84.

In this case there are only two witnesses as to what actually occurred, the plaintiff and the defendant. The plaintiff testified:- He was driving north on Nameoki Road and first saw defendant's car after he had stopped at the intersection at East 24th Street, waiting to make his left turn; the defendant's car was then at Lincoln Avenue, to the south about 200 to 250 feet distant; as he sat there waiting to make the turn, some ten to fifteen seconds later the defendant ran into the rear of his automobile; plaintiff was driving along with his left window closed; he rolled the window down, and put his arm out for a left hand turn while he traveled approximately 30 feet; he had made a complete stop and was waiting for three cars approaching from the north to pass before making his left hand turn; that when struck he had both hands on the steering wheel, his brake on because of a grade, and his stop lights were working and on; that he had come to a gradual stop.

The defendant testified:- He first saw the plaintiff's car as he crossed East Twenty-Third Street; it was approximately two and one-half car lengths ahead of him and both cars were traveling north at approximately twenty-five miles an hour; as he approached the intersection at East Twenty-Fourth Street, he noticed a car coming out

from East Twenty-Fourth Street; he did not see any traffic southbound on Nameoki Road at that time; he had seen some southbound traffic on Nameoki Road when he crossed Lincoln Avenue, some 200-250 feet south of the point of collision; he was watching the car from East Twenty-Fourth Street and the car of the plaintiff, and then he saw the car directly ahead of him, the plaintiff's car, was stopped; he applied his brakes but ran into the plaintiff's car; he did not see any brake lights and did not see the plaintiff give any left turn signal at any time; he did not see the plaintiff stop his car, but when he did see the plaintiff's car was stopped, he applied his brakes; that he had no indication that the plaintiff was going to stop or turn.

The testimony is contradictory. The plaintiff claims he signalled for a stop and stopped gradually. The defendant claims he did not see any indication of stopping by arm signal or lights from the plaintiff and that the plaintiff stopped suddenly. In view of the provisions of the Uniform Act Regulating Traffic on Highways, Par. 162, Chapter 95 1/2, Ill. Rev. Statutes (1959(, requiring a signal of intention to turn either right or left and that no driver of a vehicle shall suddenly decrease his speed without giving a signal to the vehicle immediately following him if the giving of such signal is possible, the questions of whether the

plaintiff slowed his car gradually and whether he gave any signals of either stopping or turning become contradicted questions of fact. The rule stated in Lowe v. Gray, 39 Ill. App. 2d 345, is particularly applicable here. If there is any evidence, however slight, of contributory negligence on the part of the plaintiff, a question of fact is presented and it must be presented to a jury for determination.

For the reasons stated, the granting of the motion of the plaintiff for a directed verdict on the question of liability of the defendant was error. The question should have been submitted to the jury. The cause will be reversed and remanded for a new trial.

Reversed and remanded for new trial.

Dove, P. J. and Wright, J. concur.

Publish in abstract only.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

(46 I.A.2 304)

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE DEWITT S. CROW, Presiding Judge

HONORABLE JOHN F. SPIVEY, Judge

HONORABLE SAMUEL O. SMITH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day of MARCH A. D. 19 64, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

10495

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

Gen. No. 10495

CHARLES E. COCHRAN, and RUSSELL S. PROCTOR, INC., a Delaware Corporation,
Plaintiffs and Appellees,

vs.

JOHN W. HOWELL,
Defendant and Appellant.

Appeal from the Circuit Court of McLean County.

CROW, P. J.

This appeal concerns the validity of a judgment order of October 10, 1962 and its attempted enforcement through supplementary proceedings under Section 73 of the Civil Practice Act, CH. 110 ILL. REV. STATS., 1963, par. 73, which resulted in a further order of May 10, 1963 of the Circuit Court of McLean County. There is no essential dispute as to the facts.

On August 23, 1961 the plaintiff Charles E. Cochran purchased a diesel truck engine from the defendant John W. Howell. The engine was sold for $1,800.00. Cochran paid Howell $700.00 in cash and a conditional sales contract was executed requiring payment of the balance in monthly installments. The diesel engine was installed by Cochran in a Diamond-T semi-trailer truck. Cochran owned the truck, and the other plaintiff, Russell S. Proctor, Inc., a corporation, claimed a chattel mortgage lien on the truck. No further payments were made on

the Cochran-Howell conditional sales contract on the engine. On December 14, 1961 Howell took physical possession of the diesel engine and the truck. After acquiring possession, Howell removed the engine from the truck and then stored the truck in a public garage. These actions were known to Cochran at the time.

Subsequently, Cochran and Russell S. Proctor, Inc. filed an action at law against Howell in the Circuit Court of McLean County, the complaint being in two counts, one by Cochran and one by Russell S. Proctor, Inc., both plaintiffs asking for an award of money damages for alleged conversion of the truck. After a preliminary motion by the defendant to dismiss was heard and denied, the issues were joined, the defendant's answer denying the essential allegations, and the case was heard by the Court without a jury. At the conclusion of the hearing the Court entered an order on October 10, 1962 awarding the plaintiff Cochran $600.00 in money damages and further providing as follows:

> "It is Further Ordered that the plaintiff Charles E. Cochran, have and receive from the defendant, John M. Howell, the immediate possession of the said International Truck Tractor, Serial No. FR921.0014 and that the said defendant pay any accrued costs and satisfy any liens for towing, storage or repairs of the aforesaid truck tractor and engine since December 14, 1961."

That judgment order did not mention or make any disposition of the claim of the other plaintiff Russell S. Proctor, Inc.

The defendant did not comply with or satisfy that judgment order of October 10, 1962, and on February 18, 1963, the plaintiff

Cochran instituted a supplementary proceeding under Section 73 of the Civil Practice Act to require the defendant to appear for examination. A hearing was held on that on April 19, 1963. At that time the defendant tendered $613.00 to the Clerk. Notwithstanding the tender, the Court entered an order on May 10, 1963 ordering the defendant, John W. Howell, "to deliver the said truck tractor to the residence of Charles E. Cochran, plaintiff herein, pursuant to Chapter 110, Section 73, Paragraph 4(a), Illinois Revised Statutes, by May 10, 1963, or stand committed for contempt of this Court, and that the term 'truck tractor' includes the parts appurtenant thereto previously removed by the said John W. Howell which are listed as follows: generator, starter, bell housing, clutch plates, fly wheel, water pump, oil cooler and exhaust manifold." The defendant appeals. Under the circumstances a more extensive statement of the facts is not necessary.

It is the defendant-appellant's theory that the Court lacked authority to enter the order of May 10, 1963 in the supplementary proceedings because the judgment order of October 10, 1962 was unenforceable as a matter of law; that the judgment order of October 10, 1962 was void; and that the order of May 10, 1963 exceeded the plaintiff's award under the original judgment order of October 10, 1962. The plaintiffs-appellees in their brief in this Court have confessed error in the entry of the judgment order of October 10, 1962.

Multiple parties plaintiff and multiple claims for relief being involved in the action, the Court might enter a final order

or judgment as to one of the plaintiffs but not all or all the claims only upon an express finding that there is no just reason for delaying enforcement or appeal: CH. 110 ILL. REV. STATS. 1963, par. 50(2); the judgment order of October 10, 1962 adjudicates fewer than all the claims and the rights and liabilities of fewer than all of the parties, and there is absent any express finding that there is no just reason for delaying enforcement or appeal; that judgment order, accordingly, does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order adjudicating all the claims, rights, and liabilities of all the parties: par. 50(2).

The purposes of a supplementary proceeding under Section 73 of the Civil Practice Act are, ultimately, to compel the application of non exempt assets or income toward the payment of the amount due under a judgment or decree. If there is no amount due under any final judgment or decree a proceeding would not lie thereunder. The procedure for a supplementary proceeding is prescribed by rule, and under Supreme Court Rule 24 a supplementary proceeding thereunder may be commenced at any time with respect to a judgment or decree upon which execution may issue: SUPREME COURT RULE 24, CH. 110 ILL. REV. STATS., 1963, par. 101.24. Under the circumstances here the judgment order of October 10, 1962 was not one upon which an execution might have issued, and hence a supplementary proceeding under Section 73 and Supreme Court Rule 24 could not be commenced with respect thereto.

It is not necessary to discuss other points raised.

The judgment order of October 10, 1962 and the order entered May 10, 1963, are reversed and set aside and the cause is remanded to the Circuit Court of McLean County for further proceedings.

REVERSED and REMANDED.

SPIVEY and SMITH, JJ. concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE DEWITT S. CROW, Presiding Judge

HONORABLE JOHN F. SPIVEY, Judge

HONORABLE SAMUEL O. SMITH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day of MARCH A. D. 1964, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

10513

FILED

MAR 6 1964

Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10513

Agenda No. 10

A. L. Stice,

Plaintiff-Appellant,

vs.

Richard Beard,

Defendant-Appellee.

Appeal from the Circuit Court of Vermilion County

SPIVEY--J.

At the conclusion of the evidence offered on behalf of the plaintiff, the Circuit Court of Vermilion County granted defendant's motion for directed verdict and caused the jury to return a verdict in favor of the defendant. Judgment was entered on that verdict, and plaintiff has appealed from this judgment.

A. L. Stice, hereafter called plaintiff, entered into a contract with Richard Beard, hereafter called defendant, on January 12, 1961, whereby the plaintiff agreed to clean and surge three water wells of the defendant. The plaintiff entered into the performance of the agreement and completed work on two wells. On the third well an old casing split and the plaintiff was unable to drive the casing down although the well was cleaned and surged but was left in an inoperable condition.

The defendant refused to pay for the services performed or any part of them, and the plaintiff brought suit for $1,153.40 claimed to be due under the contract.

The plaintiff did not allege in his complaint that he had a valid water well contractor's license as required by Section 25 of the Water Well Contractor's License Act. (Sec. 116.100, Chapter 111 1/2, Ill. Rev. Stat.)

Prior to the execution of this contract the General Assembly enacted the Water Well Contractor's License Act, (Sec. 116.76, et seq., Chapter 111 1/2, Ill. Rev. Stat.) effective January 1, 1960. The pertinent portions of the statute provide as follows:

Sec. 116.77. " * * *.

"'Water well Contractor' and 'Contractor' mean any person who contracts to drill, alter or repair any water well.

" * * *.

Sec. 116.79. "Subject to the provisions of Section 3, after January 1, 1960, no contractor shall drill a water well or engage in the occupation of a water well Contractor unless he holds a valid license as a water well Contractor issued by the Department under this Act. Nothing contained herein shall prevent or preclude any person not licensed under this Act or his employee from installing or servicing water well pumps, water pumps, water well pumping units, pressure tanks and connections thereto after any water well has been drilled.

Sec. 116.100. "No action or counterclaim shall be maintained by any contractor in any court in this state with respect to any agreement, work, labor or materials for which a license is required by this Act or to recover the agreed price or any compensation under any such agreement, or for any such work, labor or materials for which a license is required by this Act without alleging and proving that such contractor had a valid license at the time of making such agreement and of supplying such labor, work or materials.

Sec. 116.102. "Whoever violates any provision of this Act shall be fined not to exceed $500. . Such fine shall be in addition to any other action that may be taken under this Act."

Plaintiff contends that cleaning and surging the wells was not such an activity as required a license and that he "did not alter or repair any water well."

Plaintiff Stice, the only witness on the trial, testified on his own behalf and described in detail the procedures followed in cleaning wells of the type owned by the defendant.

He stated he moved a six ton Bucyrus Erie drilling rig over each of the wells, inserted a line of pipe into the well casing and into the screen. Burlap was wrapped around the end of the inserted line of pipe so as to give friction in pulling up the screen.

He described the screens as being eight feet in length, from eight to ten inches in diameter depending upon the size of the well casing, and weighing about one hundred pounds. The screens are swedged to the bottom end of the well casing.

Following the swedging of the screen to the bottom of the well casing the surging operation is commenced. The bit is removed from the string of tools and replaced by a washer, and the machine is set in a spudding motion up and down resulting in bringing sand into the screen which is removed with a bailer. This operation is continued until sand no longer accumulates in the screen.

All of the above operations are accomplished by the use of the well drilling rig fitted with various tools and appliances.

The plaintiff further testified that in addition to the operation performed on the first well he welded a piece of pipe on the top of the well casing of the second well.

In describing the operation on the third well he said that he was required to break off a buried T with a sledge hammer. He further stated that on this third well he was unable to drive the casing down to a point representing the bottom of where the screen had been located.

Following a conversation with the defendant concerning the third well, further operations were abandoned.

In classifying the work done, the plaintiff stated that cleaning and repairing applied to the same thing and that cleaning a well might be classified as repairing a well.

The plaintiff further testified that he did not hold a water well contractor's license and that in fact he had failed to pass the well driller's examination in December, 1962.

Plaintiff's statement of charges to the defendant commenced as follows: "Well repair at your place is as follows."

By preamble the General Assembly evidenced its intention in passing the Water Well Contractor's Licensing Act when it said,

"Whereas, because there is an ever increasing shortage of water supply in this State it is imperative that the health and general welfare be protected by providing a means for the development of the natural resource of underground water in an orderly, sanitary and reasonable manner without waste so that sufficient sanitary supplies for continued population growth and for future generations may be assured; and to this end it is essential that Contractors engaged in water well drilling cooperate with the State of Illinois in procuring information necessary to provide for the development of proper ground water resources; therefore . . . "

By that preamble in considering the public health and general welfare by providing a means for the development of underground water in an orderly, sanitary and reasonable manner without waste, the General Assembly obviously meant the Act to be remedial in nature.

By its provisions the Act is also penal in nature.

Plaintiff urges that the statute in question, being both remedial and penal in nature, should be construed with a reasonable degree of strictness so as not to include anything beyond the immediate scope and objects even though it be within the spirit of the Act. The plaintiff seeks to have us construe that statute in such a manner as to hold that the activities of the plaintiff were not repair and so to permit recovery by the plaintiff.

However, before a statute is open to construction there must be an ambiguity present. "There is no rule of construction which authorizes us to declare that the legislature did not mean what the plain language of a statute imparts," Bismark Hotel Co. v. Petriko, 21 Ill. 2d. 481, 173 N.E. 2d. 509. Where the language used by the legislature is clear and does not admit of construction, there is no ambiguity present and construction would not be proper. Sager Glove Corp. v. Continental Cas. Co., 37 Ill. App. 2d. 295, 185 N.E. 2d. 473; Streator Tp. High School Dist. No. 40 v. County Board, 14 Ill. App. 2d. 251, 144 N.E. 2d. 531.

"It is well settled that, in the absence of statutory definitions indicating a different legislative intention, the courts will assume that words have their ordinary and popularly understood meanings." Farrand Coal Co. v. Halpin, 10 Ill. 2d. 507, 140 N.E. 2d. 698. "The words of a statute must be given the meaning accorded to them under common and ordinary usage, in contexts similar to that of the statute." Ill. State Toll Hwy. Comm. v. Einfeldt, 12 Ill. 2d. 499, 147 N.E. 2d. 53.

In the case of Kaufman v. Shoe Corp. of America, 24 Ill. App. 2d. 431, 164 N.E. 2d. 617, the court used the ordinary meaning of "repair" as given in Funk & Wagnall's New Standard Dictionary, to wit: "restoration after decay, waste, injury or partial destruction; supply of loss; reparation."

Webster's New International Dictionary defines the word "repair" as "to restore to a sound or good state after decay, injury, dilapidation or partial destruction."

It is significant that the plaintiff himself, who has had thirty-two years experience as a water well contractor, stated that the operation he performed upon defendant's wells could be that of repair.

From the plaintiff's description of the operation, which involved moving practically the entire make-up of the well, and in particular that part at the source of the supply of water, together with necessary drilling required while driving the casing, it appears to us that he thereby effected repairs to the well. Prohibition of such activity is reasonably included in the object of the Act protecting the health and welfare of the public.

When the Act relating to the licensing of water well contractors is measured by the foregoing rules, definition and admissions by the plaintiff, we are of the opinion that a fair and reasonable interpretation of that statute would include plaintiff's work in the category of repairs without including anything beyond the Act's immediate scope and object.

For the first time on appeal plaintiff contends that the statute is unconstitutional. Of course we cannot consider this question.

Defendant has urged other grounds for affirmance. In view of what has been said, it will be unnecessary to consider those points.

The judgment of the Circuit Court of Vermilion County is affirmed.

Affirmed.

CROW, P.J. and SMITH, J. concur.

General No. 11820 Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

October Term, A. D. 1963

(46 I.A.2 311)

LUCILLE HIMES, Plaintiff-Appellee, vs. LARRY LANZ, Defendant-Appellant.	Appeal from the Circuit Court of LaSalle County.

DOVE, .J.

Lucille Himes brought this action to recover damages for personal injuries sustained by her, a guest passenger in the car of defendant, Larry Lanz. The issues made by the pleadings were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff for $13,325.00. To reverse this judgment defendant appeals.

Appellant contends (a) that the evidence discloses that plaintiff did not make out a case of wilful and wanton misconduct and the trial court should, therefore, have directed a verdict in favor of defendant; (b) that the verdict of the jury is contrary to the manifest weight of the evidence, and (c) the court made certain prejudicial rulings relative to evidence and instructions which influenced the jury in reaching its verdict.

This accident occurred on Sunday, October 16, 1960, on Route 71 near Ottawa in LaSalle County, Illinois. Plaintiff, a thirty-eight-year-old divorcee, lived with her fifteen-year-old daughter in Ottawa, where she was employed as a dental assistant. On July 3, 1960, she met the defendant at the non-commissioned officers club at Wallace Barracks, which is located north of Ottawa. He was twenty-five-years-old and bore the rank of Second Lieutenant in the Army. After their meeting, plaintiff

and defendant became good friends and were frequently together. Defendant owned a red Austin Healy Sprite automobile and on October 16, 1960, defendant, about four o'clock in the afternoon, arrived at plaintiff's apartment, where plaintiff was entertaining her cousin and a friend of her cousin. Plaintiff introduced the defendant to her cousin and his friend and shortly thereafter went to the kitchen to prepare dinner for herself and defendant. The defendant said to plaintiff, "How about a martini?" Plaintiff replied, "Well, I'll have one later before we eat dinner, but I don't care to have one now." Defendant then proceeded to mix the martinis and took the shaker and two glasses to the porch where they engaged in conversation. Plaintiff's cousin and friend left, and plaintiff's testimony was that she did not drink a martini and did not see Larry Lanz, the defendant, drinking any of his mixture.

Shortly thereafter plaintiff and defendant left plaintiff's home in defendant's automobile and after calling at the home of a friend of the plaintiff's they drove back to Ottawa and crossed the Illinois River on what is known as Hilliard Bridge. After crossing the bridge, defendant drove west on Route 71 toward Starved Rock State Park. Route 71 is a two-lane concrete base highway covered with blacktop. It runs along the Illinois River and is eighteen feet wide. The weather on the afternoon of the accident was clear and the pavement dry.

The defendant had moved into new living quarters earlier in the day of the accident and was living at Lincoln Court Cabins which were located on Route 71 four-tenths of a mile west of the Hilliard Bridge. Plaintiff testified that when the defendant came to the Lincoln Court Cabins he was driving fast and turned the car into the driveway and without stopping he swerved his car back

onto the highway, skidding in the gravel and throwing the plaintiff off balance. She testified that defendant made the remark, "Oh, the Chief's car isn't in", and that she said to defendant, "What's your hurry? Slow down."

Defendant continued driving west on Route 71 and after he had driven about two miles further west he came to a curve in the road which is identified in the record as a curve near the washed-out bridge. Plaintiff testified that as defendant went around this curve, he said to her: "You don't have to worry. This car is different from conventional American made cars. This car can't turn over on curves". This conversation occurred about two and two-tenths miles east of the scene of the accident. Plaintiff's testimony was that she had no recollection of anything that transpired after this conversation. Defendant was not present at the trial and there was no testimony of any occurrence witness.

Robert Wahl, a State Trooper, arrived at the scene of the accident at about 6:30 P. M. He testified that he found defendant's car up against a tree located about six feet off of the north edge of the highway. From this tree to the Illinois River was a distance of about fifteen feet. Wahl testified that there were a number of scratch marks on the right side of the car which had been put there by bushes and trees along the road after it had left the highway. Leading back east on the shoulder of the pavement, from the tree where the car stopped "were 129 feet of ruts or skid marks" made by the defendant's car on the grass and earth. The tree where the car stopped, the State Trooper testified, was 1,000 feet west of the first curve which makes

up an "S" curve known as the Fishburn curve. He also testified that Route 71, from Hilliard Bridge to the scene of the accident, was full of curves and no passing zones which would have to be travelled with caution and that the accident happened just beyond a no passing zone. After investigating the scene of the accident, Wahl went to the hospital in Ottawa where the defendant was. He talked to him in the hospital and asked him if he had been drinking before the accident. To this question defendant replied: "Yes, Sir, I had a couple of beers this afternoon and I had a couple of martinis at her apartment". In reply to a question, "What happened?", defendant stated he did not know what happened, that he could not estimate his speed, that he was looking at the plaintiff and talking to her and "that was all he knew". Wahl gave him a ticket for "Wrong Lane Usage", whereupon defendant asked him what that meant and Wahl told him that it meant that he used his lane of traffic wrongly. Later the defendant entered a plea of guilty to this violation and paid a fine.

William Dummett testified for the plaintiff and stated that he was a deputy sheriff in LaSalle County and had been for about nine years and had been a photographer for about fifteen years; that about six o'clock on the afternoon of the accident he received a report on the police radio that there had been an accident on Route 71 on the Fishburn curve and when he arrived he found State Trooper Wahl there; that he got out of his car and observed the defendant's car and saw the marks along the shoulders of the road testified to by Trooper Wahl; that he also observed a lot of debris scattered around and saw that the front end of defendant's car was caved in where it had hit the tree and that the rest of the vehicle was considerably damaged: that he saw the broken branches on the bushes and trees along the shoulder of the road where the defendant's car had brushed them.

Plaintiff also testified that she had ridden with defendant over Route 71 from Hilliard Bridge to Starved Rock at least a dozen times and that defendant was very familiar with the road: that as a result of the accident, she sustained fractures to eleven ribs, a compound fracture of the right tibia and fibula, and multiple lacerations to her head, face and shoulders and a possible heart injury. She was in the hospital from the day of the accident to January 3, 1961, and returned to work on February 13, 1961.

The foregoing is a fair resume of the evidence. There is no direct testimony as to what happened after the defendant's car reached a point about two and two-tenths miles from the point where the defendant's car collided with the tree along the side of the road. Counsel insists that upon the evidence found in this record the jury was not justified in finding defendant guilty of wilful and wanton misconduct. Counsel argues that there is a conspicuous lack of proof of any wilful and wanton misconduct on the part of defendant and that plaintiff "cannot rely on inuendo or speculation to establish the case". In support of this contention counsel cite and rely upon Fosdick v. Servis, 40 Ill. App. 2nd 363, 189 N.E. 2nd 538, Bartolucci v. Falletti, 382 Ill. 168, 46 N.E. 2nd 980 and Pritchett v. Rich, 14 Ill. App. 2nd 215, 144 N. E. 2nd 173. These cases are all distinguishable from the instant case. In the Pritchett case, the host driver did not realize that he was so close to a curve. It was dark and he lost control of his car while traveling at a speed of 55 miles per hour. In the Fosdick case, the host driver was travelling 10 to 15 miles per hour when she had a sudden unexpected pain and lost control of her car. In the Bartolucci case a wheel came off of the host driver's car.

Anderson v. Launer, 13 Ill. App. 2nd 530, was a wilful and wanton misconduct case brought by the administrator of a passenger against the passenger's host, the owner and driver of the automobile. Defendant there, as here, insisted that there was no proof of wilful and wanton misconduct. Direct testimony was lacking in that case with respect to the conduct of the defendant and others while on the road immediately prior to the accident. There was evidence in that case as in the instant case, of the physical facts and circumstances surrounding the accident. This evidence showed that there were tracks on the shoulders, that the car had left the road, first on one side and then on the other side, and then plunged over an embankment traveling a considerable distance prior to hitting a tree. The evidence also showed that the defendant's car had been out of control for 300 to 400 feet. A police officer testified that, based upon the physical facts present at the scene of the accident, the car was traveling at a very rapid rate of speed. In its opinion, the court said:

> "What constitutes wilful and wanton conduct depends on the facts in each case and it cannot be categorically stated what conduct is, and what conduct is not, wilful and wanton. Wilful and wanton misconduct may consist of an entire absence of care for the life, person, or property of others such as exhibits a conscious indifference to consequences or utter disregard of the consequences. This proposition of law is so well established that we deem a citation of authority unnecessary. The driving of a car by one who is under the influence of intoxicating liquor, knowing that he is responsible for the driving of a motor vehicle and knowing that such vehicle in the hands of one so influenced becomes a dangerous instrumentality to the public as well as his guest, responds to all of the foregoing elements. In addition, and without reference to the question of being under the influence of intoxicating liquor, it was held in Robinson v. Workman, Supra, that circumstantial proof, where that is the best available, that the car was being operated in an erratic manner, from one side of the road to the other without being under proper control was evidence of wilful and wanton misconduct. It therefore becomes apparent that we cannot hold that there was no evidence tending to prove the defendant guilty of wilful and wanton misconduct."

Hatfield v. Noble, 41 Ill. App. 2d 112, was another wilful and wanton misconduct case in which the plaintiff was riding as a guest passenger in a car owned by and being driven by the defendant. The evidence in that case showed that the accident happened on a rainy night, that the plaintiff and defendant had been doing some drinking the afternoon of the accident, and that the defendant was driving the car at a high rate of speed. It was contended there that the evidence did not show wilful and wanton misconduct. In its opinion the court said:

> "As to whether or not conduct is wilful and wanton in any given case necessitates close scrutiny of the facts as disclosed by the evidence, and while the rule of law to be applied does not vary, the facts to which the law is applicable always present different circumstances and facts which are in the main wholly dissimilar. Mower v. Williams, 402 Ill. 486, 84 NE 2d 435."

After referring to the definition of wilful and wanton conduct as set forth in Bartolucci v. Folleti, 382 Ill. 168, 46 N.E. 2d 980, the court said:

> "For an act to be wilful and wanton, the defendant need not have intended that any harm should ensue, nor actually know for sure that there would be any harm done. It is sufficient if he had notice which would alert a reasonable man that substantial danger was involved and failed to take reasonable precautions under the circumstances. Hering v. Hilton, 12 Ill. 2d 559, 147 NE 2d 311."

> "In the measurement of defendant's conduct this court cannot consider the conflicts in evidence nor its weight, nor preponderance, nor the credibility of witnesses, but must take the evidence as true which is most favorable to the plaintiff's cause of action. Smith v. Polukey, 22 Ill. App. 2d 238, 160 NE2d 508.

> "If when so considered there is any evidence standing alone and considered to be true together with the inferences that might legitimately be drawn therefrom which fairly tends to support the jury verdict, it is error to direct a verdict or enter judgment notwithstanding the verdict. Zank v. Chicago, R. I. & R. O. Co., 17 Ill. 2d 473, 161 NE2d 848."

> "In the instant case it can be assumed that defendant did not intentionally desire to injure the plaintiff. His conduct, however, in driving his automobile on a highway which contained many curves on a dark misty, rainy night at a speed up to 80 miles an hour when he was acquainted with the highway and knew that there were many curves to negotiate and continued to so drive until the automobile left the highway and struck a tree, constituted a combination of acts which could fairly be interpreted as wilful and wanton misconduct."
>
> "Under these circumstances, it is our judgment that all reasonable men would not agree that defendant was not guilty of wilful and wanton misconduct. Therefore, the trial court properly regarded the issue of whether plaintiff's injuries were inflicted by defendant's wilful and wanton misconduct as a question of fact to be determined by the jury, and the court committed no error in denying defendant's motion for judgment notwithstanding the verdict."

We have reviewed the evidence in this record carefully and we do not believe that all reasonable men would agree that defendant was not guilty of wilful and wanton misconduct. We believe the evidence, circumstantial and otherwise, together with all inferences legitimately flowing therefrom, presented an issue of fact to be decided by the jury. We cannot say, as we must in order to allow defendant's motion for judgment notwithstanding the verdict, that there is in this record no evidence to support the verdict. We believe that there is.

During the course of the trial, counsel for plaintiff, in the presentation of plaintiff's case, called the defendant three times for cross-examination under Section 60 of the Civil Practice Act. Defendant was not present at the trial and did not respond. The court then entered an order prohibiting him from testifying in his own defense if he did not appear before the plaintiff rested her case. Defendant insists that this was reversible error. Plaintiff points out that this case was continued on motion of the defendant three times prior to the trial of it in January, 1963. The basis of the continuances

was the difficulty defendant would have in being present because he was out of the jurisdiction of the court. On the day of the trial, January 16, 1963, counsel for the defendant told the court and jury that he had contacted the defendant and that he was on his way and would be there to testify in his own behalf. The trial lasted three days but defendant made no appearance. He was no longer in the military service and had not been for several months and if he desired to testify, his presence in court was necessary. As he never appeared, defendant was not prejudiced by the ruling complained of.

We have considered the other errors relied upon by appellant with reference to the admissibility of evidence and the giving of instruction No. 9 but find no reversible error in connection with these matters.

The judgment of the Circuit Court of LaSalle County is affirmed.

Judgment Affirmed

McNeal, P.J., concurs.

Smith, J, concurs.

64-F-13 Agenda 7

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MINNIE TOPAL, Administrator of the Estate of Norbert Schramm, Deceased, and Conservator of the Estate of Joseph Schramm, an Incompetent,	)	
Plaintiff,	)	Appeal from the Circuit Court of Madison County, Illinois.
vs.	)	
MIKE BEQUETTE,	)	
Defendant.	)	

WRIGHT, JUSTICE.

A complaint was filed by the plaintiff, Minnie Topal, Administrator of the Estate of Norbert Schramm, deceased, and Conservator of the Estate of Joseph Schramm, an incompetent, against defendant, Mike Bequette, to collect rents in the amount of $500.00 per month allegedly due for the occupancy of a certain farm in Madison County, Illinois, from March 1, 1960, to June 11, 1960.

The matter was submitted to a jury on the issues as set forth in Court's Instructions No. 1 and 2 and the jury returned a verdict for the plaintiff in the amount of $300.00. Judgment was entered on the verdict and the plaintiff brings this appeal.

There is no major dispute as to the facts. On February

15, 1955, defendant leased the farm in question from Norbert Schramm for a five year period. On December 19, 1957, the lease was extended by written agreement between Norbert Schramm and defendant to March 1, 1965. Norbert Schramm died on March 7, 1958, leaving as his only heirs at law, Joseph Schramm. Plaintiff was appointed Administrator of the Estate of Norbert Schramm and Conservator of the Estate of Joseph Schramm.

Thereafter, legal action was brought by the plaintiff against the defendant in a Justice of the Peace Court and the case was decided in favor of plaintiff, and was appealed by defendant to the Circuit Court of Madison County, Illinois, under Cause No. 58-L-751. While the Circuit Court case was on the trial docket for the Circuit Court of Madison County, Illinois, a stipulation was made of record for the purpose of settlement in the presence of the parties, their attorneys, the trial judge and the court reporter on August 31, 1959. By the terms of this stipulation, the defendant, among other things, was to deliver possession of the farm in question on March 1, 1960.

After the stipulation of August 31, 1959, the defendant filed a motion to dismiss the stipulation. This motion was argued on October 23, 1959, and denied. On December 16, 1959, Notice of Appeal was filed. The record was never filed with the Appellate Court and on May 3, 1960, upon the motion of the plaintiff, the Fourth District Appellate Court entered an order dismissing this cause for failure to file a record.

While the aforementioned appeal was pending, plaintiff,

on January 12, 1960, caused a notice to be delivered by Registered Mail to the defendant advising that if possession was not delivered on March 1, 1960, the rent would be $500.00 per month for each month thereafter.

Defendant did not deliver possession of the premises on March 1, 1960, but remained on the farm until after a public sale was held on June 11, 1960, and then delivered possession to the purchaser at the public sale pursuant to an agreement between the defendant and the purchaser. No rent was paid by the defendant to the plaintiff.

Defendant answered the complaint and interposed certain affirmative defenses, among them being (1) "That the cause of action referred to herein was finally adjudicated in Law No. 58-L-751, said order having become final after an appeal to the Appellate Court of this District wherein judgment was rendered on the 3rd day of May, A.D. 1960", and (2) "That the notice given by the plaintiff to the defendant herein on January 12, 1960, was void, having been given prior to final judgment in Law Suit No. 58-L-751," and (3) "That the defendant was in possession of the farm in question under a lease referred to as a 'Crop Share Lease' and under which lease nothing became due to the plaintiff."

At the close of all the evidence, the court submitted to the jury certain instructions designated Court's Instruction No. 1 and Court's Instruction No. 2, which two instructions were given over the objection of the plaintiff and were as follows:

Court's Instruction No. 1

"The plaintiff has the burden of proving each of the following propositions:

First, that the defendant entered into a written stipulation in this Court in Cause No. 59-L-751, being styled Minnie Topal, Administrator of the Estate of Norbert Schramm, Deceased, and Conservator of the Estate of Joseph Schramm, an Incompetent, v. Mike Bequette, wherein defendant agreed to deliver possession of the Schramm farm to the plaintiff on or before March 1, 1960;

Second, that the plaintiff caused to be served a written notice upon the defendant on or about January 12, 1960, stating that should the defendant fail to deliver possession of the Schramm Farm to the plaintiff on or before March 1, 1960, the defendant would be charged a rental of $500.00 for each and every month for which he retained possession of said farm beyond March 1, 1960;

Third, that the defendant continued in possession of said farm subsequent to and after March 1, 1960, and until said farm was sold on June 11, 1960;

Fourth, that the defendant has not paid to the plaintiff rents for the occupancy of said farm for the period from March 1, 1960, to June 11, 1960.

In this case, defendant has asserted certain affirmative defenses:

First, that defendant remained on said farm pending a final adjudication of a previous lawsuit;

Second, that defendant was in possession of said land under a crop-share lease.

Defendant has the burden of proving these defenses.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved and that none of the defendant's

affirmative defenses has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any one of the propositions the plaintiff is required to prove has not been proved, or that any one of the defendant's affirmative defenses has been proved, then your verdict should be for the defendant."

Court's Instruction No. 2

"The plaintiff claims that by Order of the Probate Court of Madison County, Illinois, dated March 12, 1958, she was appointed Conservator of the Estate of Joseph Schramm, an incompetent, and Administrator of the Estate of Norbert Schramm, deceased, and brings this action as such Conservator and Administrator.

That on or about August 31, 1959, plaintiff entered into a stipulation and agreement with the defendant in a suit then pending in this court, bearing style of Minnie Topal, Administrator of the Estate of Norbert Schramm, deceased, and Conservator of the Estate of Joseph Schramm, an incompetent, vs. Mike Bequette, and being numbered Law No. 58-L-751, and which stipulation provided, among other things, that the defendant was to deliver possession of certain land known as the 'Schramm farm', on or before March 1, 1960.

That on or about January 12, 1960, plaintiff caused to be served upon the defendant a notice which stated, among other things, that, should the defendant fail to deliver possession of the Schramm farm to plaintiff on or before March 1, 1960, a rental charge of $500.00 would be charged to the defendant for each and every month for which he withheld possession of said farm from the plaintiff.

That notwithstanding said stipulation and agreement and notwithstanding the notice dated January 12, 1960, defendant refused to deliver possession of the Schramm farm on or before March 1, 1960, and continued in possession of said farm until it was sold at public auction on June 11, 1960, all to the damage of the plaintiff in the amount of $2,000.00.

> The defendant admits that plaintiff was appointed Conservator of the Estate of Joseph Schramm, an incompetent, and Administrator of the Estate of Norbert Schramm, deceased, and also admits that said notice was void and of no effect whatsoever. Defendant denies all of the other matters alleged by the plaintiff in her claim, and also sets up the following defenses:
>
> "That defendant remained on said farm pending a final adjudication of a previous Lawsuit, and, that defendant was in possession of said land under a crop-share lease.
>
> "The plaintiff denies the matters alleged in the defendant's affirmative defenses."

A determination of whether or not the defendant was in possession of the farm under a crop-share agreement, depended entirely upon the legal effect of the stipulation of August 31, 1959, entered in Case No. 58-L-751, upon the crop-share agreement and the subsequent legal effect, if any, of the notice of appeal upon that stipulation. As long as that stipulation stood as a matter of record, it was conclusive between the parties and could not be met by evidence tending to show that the facts were otherwise. Shell Oil Co., v. Industrial Commission, 407 Ill. 186, 94 N. E. 2d 888.

It is the province of the courts in cases brought before them to determine what the issues are, as well as the legal conclusions, which result from the facts stipulated or proved in the record. National Bank of Colchester v. Murphy, 384 Ill. 61, 50 N. E. 2d 748.

In civil actions tried before a jury, the rule is well settled that questions of law are for determination by the court and not the jury. 34 I L P, Chap. 5, Sec. 111.

The court by Court's Instruction No. 1 told the jury that defendant had asserted certain affirmative defenses to the complaint. First, that the defendant remained on said farm pending a final adjudication of a previous law suit and, second, that defendant was in possession of said land under a crop-share lease, and further told the jury that the burden was on the defendant to prove these defenses.

Court's Instruction No. 2 told the jury that certain affirmative defenses had been asserted by the defendant as follows: That defendant remained on said farm pending a final adjudication of a previous law suit, and that defendant was in possession of said land under a crop-share lease and further told the jury that plaintiff denied the matters alleged in the affirmative defenses.

The facts surrounding the stipulation in Case No. 58-L-751 in the trial court and its status on appeal in the Fourth District Appellate Court at the time plaintiff gave the notice for possession are all a matter of public record in the Circuit Court of Madison County, Illinois. Consequently, the question as to the date of the final adjudication of any pending litigation and whether or not the defendant remained on said farm pending final adjudication of a previous law suit and the contents of the stipulation, which was a matter of record in the Circuit Court of Madison County, and its effect on the crop-share agreement were all questions of law for the court and should not have been submitted to the jury.

The judgment of the Circuit Court of Madison County is reversed and the cause remanded, with directions to proceed in a manner not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

DOVE, P.J. and REYNOLDS, J., Concur

Publish Abstract only.

49239

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
ROY CLEMENS (Impleaded),
Defendant-Appellant.

Writ of Error to the
Criminal Court of
Cook County

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of conviction on a charge of extortion. On September 21, 1961, at about 8:00 P.M., Officers Clemens, Kilroy, and Walden, while on special assignment to check on teen-age gang activity, were proceeding east on 16th Street, when they saw a boy go into a tavern at 4321 W. 16th Street. The officers parked alongside the building, entered the tavern, and apprehended the boy, Robert Scott. Robert, who was fifteen years of age at the time, told them that he was the son of the owner, that the family lived upstairs, and that he had come down to give the bartender, his uncle, a message. While the officers took him outside the tavern, Mr. Sammie Scott, his father and owner of the tavern, came downstairs to find out why his son was being detained by the police. Mr. Scott and Officer Clemens re-entered the tavern and a hallway leading from the tavern to the apartments upstairs. Mr. Scott went upstairs to speak with his wife; his wife came down and talked to Officer Clemens. It is at this point that the testimony is conflicting. The State claims that Clemens demanded money for the release of Robert and was given fifteen or sixteen two-dollar bills to secure Robert's release; Clemens denies receiving any money for the boy's release and claims he released the boy because he felt sorry for the Scotts. The officers then left and resumed their patrol.

Mr. Scott went immediately to the police station to report the incident. As a result of his report, a line-up was arranged which included the three officers. All three were identified by Sammie Scott and Robert Scott, as well as three other persons who were in the tavern at the time of the alleged extortion. After the line-up, the officers were searched but no two-dollar bills were found. A search of the squad car also did not reveal any two-dollar bills.

Sammy Walden and Roy Clemens were indicted by the Grand Jury of Cook County on November 28, 1961 and charged with bribery, malfeasance, and extortion. The three indictments were consolidated for trial and a jury was waived. On May 4, 1962, the trial judge found Sammy Walden not guilty on all three indictments, found the defendant, Clemens, not guilty of bribery or malfeasance, but guilty of extortion. Motions for a new trial and in arrest of judgment were denied and defendant was sentenced to ninety days in the County Jail and fined one dollar.

The defendant's theory is (1) that the indictment under which the defendant was found guilty is insufficient to charge any offense, and (2) that the State failed to prove defendant guilty beyond a reasonable doubt.

As to the first ground it will be noted that the indictment, upon which defendant was found guilty of the crime of extortion, is couched in the specific language and terms of section 93 of the Illinois Criminal Code (Ill. Rev. Stat. 1961, ch. 38, § 240). That section reads:

> "240. Punishment.] § 93. Whoever, either verbally or by written or printed communication maliciously threatens to accuse another of a crime or misdemeanor, or to expose or publish any of his infirmities or failings, with intent to extort money, goods, chattels or other valuable thing, . . . shall

> be fined in a sum not exceeding $500, and imprisoned not exceeding six months."

It is immaterial that the indictment did not designate under which statute it was laid. It is sufficient that the indictment specified the elements of the offense with sufficient particularity to apprise the accused of the crime charged and enable him to prepare his defense. People v. Sullivan, 29 Ill. App.2d 479, 173 N.E.2d 577 (1961).

Defendant also claims that on the facts of this case he could not be prosecuted under section 240. Section 240 deals, among other things, with threats to accuse another of a crime or misdemeanor. In the case at bar, Clemens threatened to arrest Sammie and Elnora Scott for committing a crime. By the act of threatening to arrest them, defendant had to, thereby, accuse them of committing a crime. Therefore, by the threat to arrest unless given money, defendant was guilty of extortion and of violating section 240. Because the act of arresting is also the act of accusing, the case of People v. Clark, 340 Ill. App. 207, 91 N.E.2d 626 (1950), is directly in point. In that case this court held that the action of a police officer in attempting to extort $50.00 under the threat of accusing an individual of homosexuality fell within the provisions of section 240. That decision was affirmed in People v. Clark, 407 Ill. 353, 95 N.E.2d 425 (1951). This analysis is implicitly approved in the recent decision of this court in People v. Baldare, 41 Ill. App.2d 67, 190 N.E.2d 179 (1963). In that case, police officers were convicted of violating section 240 by threatening to arrest an individual for contributing to the delinquency of a minor if that individual did not pay them off. The indictment for extortion, under which the defendant was

found guilty, clearly apprised the defendant of the crime for which he was charged.

The second ground urged for reversal is that the evidence was insufficient to sustain the conviction. The scope of appellate review of criminal cases was set forth in the recent Illinois Supreme Court decision of People v. Washington, 27 Ill.2d 104, 187 N.E.2d 739 (1963), at page 110:

> "But, where, as here, a case is tried without a jury, it is the function of the trial court to determine the credibility of the witnesses and to evaluate conflicting evidence, and a conviction based thereon will be reversed on review only where the evidence is so unreasonable, improbable or unsatisfactory as to leave a reasonable doubt of the defendant's guilt. . . . ."

To the same effect are People v. Thorton, 26 Ill.2d 218, 186 N.E.2d 239 (1962); People v. Saisi, 24 Ill.2d 274, 181 N.E.2d 68 (1962); People v. Dillon, 24 Ill.2d 122, 180 N.E.2d 503 (1962). The sole case that defendant cites in support of his argument that the State failed to prove defendant guilty beyond a reasonable doubt uses a test substantially the same as the test set forth above. In that case, People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96 (1958), the court said at page 296:

> "But it is always the duty of this court to examine the evidence in a criminal case, and if it is so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt the conviction will be reversed. . . . ."

A review of the evidence makes it clear that it is not so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt.

The basis of the charge against the defendant was that he accepted fifteen or sixteen two-dollar bills for the release of Robert Scott. Five persons testified to seeing defendant accept the money. No one, except defendant, testified that he did not accept

any money. All the evidence, and especially the testimony of the said five persons as to the defendant's guilt, is not so unreasonable, improbable, or unsatisfactory as to leave a reasonable doubt of the defendant's guilt.

The alleged flaws in the State's proof are minor and do not raise a reasonable doubt of the defendant's guilt. As was said in People v. Owens, 23 Ill.2d 534, 179 N.E.2d 630 (1962), at page 538:

> "We have repeatedly said that the requirement that the defendant's guilt be proved beyond a reasonable doubt does not mean that the trier of the fact must disregard the inferences that flow naturally from the evidence before it. The trier of the fact is not required to search out a series of potential explanations compatible with innocence and elevate them to the status of a reasonable doubt.' . . . ."

The trial judge, having the corroborated and credible testimony of the numerous witnesses for the State, challenged only by the unsupported testimony of the defendant, properly found the defendant guilty of the crime of extortion. Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

49157

DOROTHY REED and ROBIN REED, a minor by DOROTHY REED, her mother and next friend,	)	APPEAL FROM THE
Plaintiffs-Appellees,	)	MUNICIPAL COURT OF
vs.	)	CHICAGO, ILLINOIS.
H. ROBERTS, INC. and HUBERT SLAUGHTER,	)	46 I.A. 2363
Defendants-Appellants.	)	

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from judgments of the Municipal Court. After directed verdicts in favor of plaintiffs on the question of liability the court permitted the case to go to the jury on the question of damages and the jury returned verdicts for a total sum of $2150. Plaintiffs sued the driver, Slaughter, and his employer, H. Roberts, Inc., for injuries sustained while they were passengers in a Yellow Cab which had stopped for a red light and was hit from the rear by defendant's cab.

Defendants claim that the trial court abused its discretion in denying a motion for continuance during the trial. It seems that on October 17, 1962, at 3:00 o'clock P. M. the case was called for trial. Both attorneys appeared and were told that the case was one of three cases that were ready and that one of the three would go to trial the next day. The trial was commenced on October 18th. Two witnesses testified on behalf of the plaintiffs who, at about 1:30 P. M., rested their case. The defendant then advised the court that he had a witness, the cab driver, for 2:30 P. M., and would like a recess until that time. The court granted this request.

At 2:40 P. M., the defendant did not produce any witness but requested a continuance until the next day on the ground that he had subpoenaed three witnesses that same day for the next day since he had not had sufficient time prior to that day to have the subpoenas served.

Rule 14 of the Supreme Court Rules provides in subsection 6 thereof that "No motion for the continuance of a case made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay."

In weighing the pressures that are put upon a busy trial lawyer who has answered "ready for trial" against the necessity for expeditious handling of jury cases by a court, we must conclude that the defendant's action in first asking for a recess to bring in a witness, and then, without producing that witness, requesting a continuance to the next day was hazardous in light of the fact that this was an uninvolved case of foreseeably short duration. The motion for a continuance did not allege a sufficient cause for delay, and its refusal was not an abuse of discretion. Marks v. Marks, 308,Ill. App.276; Gunderson v. First Nat. Bank, 296 Ill. App. 111.

Defendant now raises an objection to the direction of the verdicts. However, he made no objection to this ruling either at the time the judge indicated his action outside of the presence of the jury or at the time the court actually instructed the jury to bring in a verdict for the plaintiffs on the question of liability. He merely reiterated his request for a continuance.

2 I.L.P., Appeal and Error, §264, contains the statement:

" . . . the failure or refusal of the court to submit the cause or

particular issues therein to the jury must be raised in the trial court or it cannot be considered on appeal."

The cases cited for this proposition do not deal with directed verdicts but with submissions of issues of fact. However, the same principle is applicable here. A trial judge must be given the opportunity, through timely objections, to consider the effects of his proposed action. In this case, an argument by defendant on purported inconsistencies in plaintiff's testimony might have prevented directed verdicts and counsel could have argued these to the jury even if he had no defense witnesses to produce. He cannot now urge error in the direction of the verdicts or the giving of the peremptory instruction on liability.

The judgments of the Municipal Court are affirmed.

AFFIRMED.

ENGLISH, P.J., and McCORMICK, J. concur.

48928

PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

ALBERT GEURKE, JAMES J. GUARINO, WILLIAM SCUDIER, LEWIS DE TRAIN, JAMES BATTAGLIA, ALPHONSE LICCIARDO, IRA KOVEN, ANGELO PRETE, ROCCO DE GRAZIA, ROCCO SALVATORE, JOSEPH ALESSI and SOPHIE MARSHALL,

Appellees.

APPEAL FROM THE CRIMINAL COURT OF COOK COUNTY.

MEMORANDUM OPINION ON ALLOWANCE OF MOTION TO DISMISS APPEAL.

This is an appeal by the state from an order in a forfeiture proceeding, returning to the defendants certain moneys seized in a gambling raid. Defendants moved to dismiss the appeal on the ground that the state had not filed the record within the maximum period allowed. That motion was taken with the case in order that we might have a fuller understanding of the matter before passing upon it.

The order of the trial court was entered March 9, 1962. Notice of appeal was filed by the state within the proper time. With respect to the record the situation is different. Under Rule 1 (1)(c) of the Uniform Rules of the Illinois Appellate Court, effective January 2, 1956, the maximum time within which a report of the trial proceedings must be certified by the trial judge is ninety-five days after notice of appeal is filed. Rule 1 (2)(d) provides that the record on appeal must be filed within ten days after the maximum extended time allowed by the trial court. The record was not filed within such time, and under Rule 1 (2)(g), the court must dismiss the appeal.

John T. Gallagher at the time of the entry of the order appealed from and for many years prior thereto, was head of the Criminal Appeals Division of the State's Attorney's Office and was responsible for the prosecution of appeals. On May 14, 1962 he became ill and was hospitalized and on June 9, 1962 he died. The state urges upon us that this unfortunate occurrence caused the delay in the filing of the record and is an adequate basis for relaxation of the rule. No discretion is given a reviewing court to waive the requirement of the rule, even under the extenuating circumstances which exist here. Cosgrove v. New York, C. & St. L. Ry. Co., 11 Ill. App. 2d 574, 138 N.E.2d 112.

The state also contends that the procedure applicable to criminal appeals should be applied in the instant case. In People v. Moore, 410 Ill. 241, 102 N.E.2d 146, it was held that an in rem proceeding to confiscate property seized as an integral part of a gambling operation is civil in nature. The rules with respect to appeals in civil cases are therefore applicable.

Defendants' motion to dismiss the appeal is granted.

Appeal dismissed.

Schwartz, P.J.
Dempsey, J.
Sullivan, J.

11814

(46 I.A.2 446)

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Ottawa, on the 1st day of January, in the year of our Lord one thousand nine hundred and sixty-four, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable WILLIAM M. CARROLL, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk Pro Tempore
JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On FEB 24 1964 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Abstract

No. 11814

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ANGELO ALONSO, Plaintiff-Appellee, vs. HYLAND BUILDERS CORPORATION, Defendant-Appellant.	Appeal from the Circuit Court of Lake County

CARROLL -- J.

This is an action to recover damages for breach of an employment contract between plaintiff, Angelo Alonso, and defendant, Hyland Builders Corporation. A jury trial resulted in a verdict in favor of plaintiff upon which judgment was entered. Following denial of its post-trial motion, defendant perfected this appeal.

In his amended complaint, plaintiff alleged in substance that on March 1, 1961, he entered into an oral agreement with the defendant; that under said agreement, plaintiff promised to enter the employ of defendant as manager of a motel known as the Waukegan Inn, at a salary of $650.00 per month plus one per cent of the gross profits of the business, on a month to month basis, to be paid to plaintiff by defendant throughout the term of his employment; that defendant agreed to employ plaintiff on such terms; that plaintiff has always

been ready to enter into the employ of the defendant under the terms and conditions of said agreement; that plaintiff at the instance and request of defendant's agents and others, sold his home in Chicago, Illinois and relying on defendant's promise to employ him plaintiff purchased a co-operative apartment in Waukegan, Illinois from the defendant; that since the date of the said agreement, the defendant, although requested to do so, has refused to receive plaintiff into its employ under the terms and conditions of said agreement. Subsequently, plaintiff was given leave to amend his amended complaint to conform to the proof. Such amendment was made and as a result the term of plaintiff's employment was alleged to be for a period of one year.

Defendant answered the amended complaint by denying that it at any time entered into any contract with plaintiff.

The sole ground relied upon for reversal is that the contract in question lacked mutuality in that it was not binding on both parties and consequently was without consideration. It is urged that the contract imposed no obligation on plaintiff; that he was not bound to enter the employ of defendant; and would be subjected to no liability for failing to do so. Plaintiff's answer to such argument is that want of consideration or mutuality of obligation is an affirmative defense and must be pleaded, and defendant having failed to set up such defense in his answer may not now urge the same on this appeal.

In the complaint as amended, it is alleged that plaintiff and defendant entered into an employment contract for a period of one year, at a salary of $650.00 per month. In its answer the defendant merely denied the existence of any contract between

the parties. If as now contended the contract was void for want of consideration, then defendant was required to plainly set forth such an affirmative defense. Sec. 43 (4) of the Civil Practice Act provides in part as follows:

> "The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of non-delivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counter-claim, or third party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply."

There would appear to be no question as to the affirmative nature of the defense upon which defendant relies. In Cunningham v City of Sullivan, 15 Ill. App. 2d 561 the court had occasion to consider the question as to what constitutes an affirmative defense, and expressed its views on such subject in this language:

> "At common law and under the codes the test of whether a defense is affirmative and so has to be pleaded by defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. The admission of the apparent right is inferable from the affirmative defense."

Here it is defendant's position that plaintiff cannot recover on the contract by reason of want of consideration. Assertion of such lack of consideration is an admission of plaintiff's apparent right and amounts to new matter defeating such right. Want of consideration to be made available as a defense must

be pleaded specially. It is not available under a general denial. Ballard v Trainor, 285 Ill. App. 509. It is to be noted that if affirmative matter showing plaintiff's claim to be unenforceable by reason of want of consideration was available to defendant, it could have moved for dismissal under Section 48 (I) of the Civil Practice Act. Since want of consideration is an affirmative defense, and defendant failed to specially plead the same, such defense is not now available to the defendant in this case. The burden of proof as to such defense if available would have rested on the defendant. We have carefully examined the evidence in the record, and it appears therefrom that the question whether the parties made mutual promises which were binding and enforceable to both was for the jury to determine from all the facts and circumstances.

Defendant does not argue that the verdict is contrary to the manifest weight of the evidence, or that there is an absence of evidence tending to prove the essential allegations of the complaint. For this reason there is no occasion for setting out the evidence in detail. It is sufficient to say that there was conflicting evidence before the jury and its verdict finds ample support therein.

Defendant devotes a portion of its brief to an argument that an agreement to enter into a future contract is not valid unless it specifies all of its material and essential terms. It is indicated that such point is urged in anticipation that plaintiff might contend on this appeal that the parties had agreed to enter into a future contract. Plaintiff makes no

such contention in his brief and accordingly there is no occasion to consider this particular point.

We find no reversible error in this record, and the judgment of the Circuit Court of Lake County is affirmed.

AFFIRMED:

Abrahamson, P. J., and Moran, J., Concur

United States of America

State of Illinois,
Appellate Court,
Second District, } ss.

I, Howard K. Kellett, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.*

In Testimony Whereof, *I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this* 27th *day of* July *A. D. 196*7

Howard K. Kellett

Clerk Appellate Court,
Second Judicial District

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